

No. 15040

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United States  
Court of Appeals  
for the Ninth Circuit

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D. M. HAGGARD and NILA HAGGARD,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax Court  
of the United States

FILED

MAY -7 1956

PAUL P. O'BRIEN, CLERK



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# THE JOURNAL OF THE ROYAL ANTHROPOLOGICAL INSTITUTE

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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Acting Asst. U. S. Attorney General,  
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Department of Justice,  
Washington 25, D. C.

For Respondents:

McLANE & McLANE,  
806 Security Building,  
Phoenix, Arizona.





The Tax Court of the United States

Docket No. 50625

D. M. HAGGARD and NILA HAGGARD,  
Petitioners,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Appearances: For Petitioners: W. Lee McLane, Jr.,  
Esq., Nola McLane. For Respondent: Arthur  
Clark, Jr., Esq.

DOCKET ENTRIES

1953

Sept. 14—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 16—Copy of petition served on General Counsel.

Sept. 14—Request for Circuit hearing in Los Angeles, Calif., filed by taxpayer. 9/21/53—Granted.

Oct. 21—Answer filed by General Counsel.

Oct. 21—Request for hearing in Los Angeles, Calif., filed by General Counsel.

Oct. 27—Copy of answer and request served on taxpayer, Los Angeles, Calif.

1955

Jan. 10—Hearing set March 21, 1955, Los Angeles, Calif.

1955

Mar. 17—Appearance of Nola McLane, as counsel filed.

Mar. 24—Hearing had before Judge Fisher, on the merits. Briefs due May 9, 1955; Replies due June 8, 1955.

Apr. 18—Transcript of Hearing 3/24/55 filed.

May 2—Motion for extension of time to May 20, 1955, to file brief, filed by taxpayer. 5/3/55—Granted.

May 5—Motion for extension of time to June 8, 1955 to file brief, filed by General Counsel. 5/6/55—Granted.

May 13—Brief filed by taxpayer. 6/7/55—Copy served.

June 6—Brief filed by General Counsel.

June 27—Reply Brief filed by taxpayer. Copy served.

July 8—Reply Brief filed by General Counsel.

Sept. 28—Findings of Fact and Opinion filed. Judge Fisher. Decision will be entered under Rule 50. 9/28/55 Copy served.

Nov. 7—Agreed Computation filed.

Nov. 9—Decision entered, Judge Fisher, Div. 15.

Dec. 28—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by petitioner.

Dec. 28—Proof of Service filed.

Dec. 28—Designation of contents of record with service acknowledged thereon, filed.

1956—Jan. 6—Designation of Additional Portions of Record with statement of service by mail thereon, filed.

Jan. 25—Order extending time to March 27, 1956 for filing the record and docketing the appeal entered.

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[Title of Tax Court and Cause.]

### PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (D:ARIZ:R:HL:oh 90-D) dated July 24, 1953, and as a basis of their proceeding allege as follows:

1. Petitioners are individuals residing at 1115 West Edgemont, Phoenix, Arizona. The return for the period here involved was filed with the Collector of Internal Revenue at Phoenix, Arizona.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on July 24, 1953.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar year 1949 in the amount of \$3,480.96 of which the entire amount is in dispute.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following error of the Commissioner:

(a) In disallowing a deduction of \$12,000 claimed by petitioners as a rental expense during 1949.

5. The facts upon which the petitioners rely as a basis of this proceeding are as follows:

(a) Petitioner D. M. Haggard rented 160 acres of farm land from the fee owner at a rental of \$12,000 for the year 1949.

(b) Said land was rented under the terms of a written lease agreement executed by the fee owner and petitioner D. M. Haggard which agreement provided that petitioner D. M. Haggard had the use of the land for approximately two years.

(c) The above lease agreement required the payment of \$12,000 as rent for the use of the land during 1949.

(d) Simultaneously with the execution of the lease agreement, the petitioner D. M. Haggard and the fee owner executed an option to purchase the land which option granted petitioner D. M. Haggard the right to purchase the 160 acres on January 1, 1950 for a purchase price of \$24,000.

(e) The said option to purchase was exercised by petitioner D. M. Haggard on January 1, 1950, and title to the 160 acres passed to petitioners at that time.

(f) The amount of \$12,000 paid by petitioners for the use of the 160 acres during 1949 constituted rent, and petitioners acquired no title or equity in the land prior to the exercise of the option to purchase on January 1, 1950.

Wherefore, petitioners pray that this Court may

hear this matter and determine that the Commissioner erred in disallowing the rental deduction of \$12,000 claimed by the petitioners, and therefore erred in asserting a deficiency of \$3,480.96 in income tax due for 1949, and as a result of such error, petitioners are entitled to a refund of \$756.76 from the Commissioner.

/s/ W. LEE McLANE, JR.,  
Counsel for Petitioners

Duly Verified.

EXHIBIT "A"

D:ARIZ:R-HL:oh-90-D

July 24, 1953

Mr. D. M. Haggard

Mrs. Nila Haggard

1115 West Edgemont, Phoenix, Arizona

Dear Mr. and Mrs. Haggard:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1949, discloses a deficiency of \$3,480.96, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia

in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Director of Internal Revenue, Audit Division, 140 West Monroe Street Building, Phoenix, Arizona. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews, Commissioner  
By Wilson B. Wood, District Director of  
Internal Revenue

Enclosures: Statement, Form 1276, Agreement  
Form 870

Mr. D. M. Haggard and Mrs. Nila Haggard, Husband and Wife, 1115 West Edgemont, Phoenix, Arizona.

Tax Liability for the Year Ended  
December 31, 1949

Deficiency in income tax.....\$3,480.96

In making this determination of your income tax



liability, careful consideration has been given to the report of examination dated January 27, 1953 and to supplemental report of examination dated April 15, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. W. Lee McLane, Jr., 808 Security Building, Phoenix, Arizona, in accordance with the authority contained in the power of attorney executed by you.

#### ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ 19,867.74
Unallowable deductions and additional income:	
(a) Agreed adjustments—report dated 12-12-50.....	3,300.20
(b) Rent deductions disallowed .....	12,000.00
	<hr/>
Total.....	\$ 35,167.94
Additional deductions:	
(c) Partnership distribution decreased .....	2,509.50
	<hr/>
Net Income, as adjusted.....	\$ 32,658.44
	<hr/> <hr/>

#### EXPLANATION OF ADJUSTMENTS

(a) Self-explanatory.

(b) It has been determined that the deduction of \$12,000.00 claimed as rental expense was in the nature of a capital expenditure for the purchase of real estate. Accordingly, the deduction claimed of \$12,000.00 is not allowable as a business expense.

(c) This adjustment is based on report dated September 5, 1952, covering the investigation of the Pecos Sales Company, Roswell, New Mexico, a partnership in which you own a third interest. Your distributive income from said partnership was decreased by \$2,509.50, as shown by the following computation:

Amount reported .....	\$ 17,752.52
Corrected, per above-mentioned report .....	15,243.02
	<hr/>
Net decrease .....	\$ 2,509.50
	<hr/> <hr/>

The above adjustment conforms with the information contained in your claim for refund filed on January 9, 1953 and is in accordance with the amount allowed in supplemental report of investigation dated April 15, 1953.

## COMPUTATION OF TAX

Net income, as adjusted .....	\$ 32,658.44
Less: 5 exemptions .....	3,000.00
Total .....	29,658.44
One-half .....	14,829.22
Tentative tax .....	4,649.73
Less: Percentage reduction:	
\$400.00 at 17% .....	\$ 68.00
\$4,249.73 at 12% .....	509.97
	577.97
Normal tax and surtax .....	4,071.76
Correct income tax liability (multiplied by 2) .....	8,443.52
Less:	
Liability per return .....	\$3,669.24
Deficiency assessed December, 1950.....	933.32
	4,662.56
Deficiency in income tax .....	\$ 3,480.96

[Endorsed]: T.C.U.S. Filed September 14, 1953.

[Title of Tax Court and Cause.]

## ANSWER

The Commissioner of Internal Revenue, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits and denies as follows:



1, 2, and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and subparagraph (a) thereof.

5. Denies the allegations contained in paragraph 5 of the petition and all subparagraphs thereof.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ KENNETH W. GEMMILL,  
Acting Chief Counsel, Internal  
Revenue Service

Of Counsel:

B. H. Neblett, Regional Counsel,  
E. C. Crouter, Acting Appellate Counsel,  
Clayton J. Burrell, Special Attorney, Internal  
Revenue Service.

[Endorsed]: T.C.U.S. Filed October 21, 1953.

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[Title of Tax Court and Cause.]

## FINDINGS OF FACT AND OPINION

(Filed September 28, 1955)

Petitioners entered into agreements in the form of a lease and option to purchase with respect to a parcel of land to be used in conducting their farm-

ing and ranching business. Under the agreements, petitioners were to pay \$10,000 for the year 1948 and \$12,000 for the year 1949 as "rent," and \$2,000 for the option to purchase the property thereafter for \$24,000. Respondent disallowed the deduction of the so-called rental payment for the year 1949 on the ground that it did not qualify as rental expense within the meaning of section 23(a)(1)(A) of the Internal Revenue Code of 1939. Held, that petitioners, through the said payment, which was excessive in relation to the fair rental value of the property, intended to and did acquire an equity in the property.

W. Lee McLane, Jr., Esq., for the petitioners.

Arthur Clark, Jr., Esq., for the respondent.

The respondent determined deficiencies in petitioners' income tax for the taxable year 1949 in the sum of \$3,480.96 by disallowing a deduction of \$12,000 claimed by them as rental expense paid for the use of 160 acres of farm land. The only question presented is whether the payment by petitioners made under the "lease" was in fact rent or whether it constituted a partial payment on the purchase price of the property by means of which petitioners acquired an equity therein.

### Findings of Fact

Petitioners D. M. Haggard and Nila Haggard are husband and wife, residing in Phoenix, Arizona. The income and deductions here in issue were reported by petitioners on their return for 1949 filed

with the collector of internal revenue for the district of Arizona.

Petitioners are engaged in operating a ranch in Maricopa County, Laveen, Arizona, consisting of approximately 1,500 acres. In early 1948, petitioners owned 1,340 acres, some of which adjoined acreage owned by John Butler. On February 9, 1948, Butler contacted Haggard, hereinafter sometimes referred to as petitioner, to ascertain if he was interested in purchasing 160 acres of farm land for \$48,000. Petitioners had formerly tried to purchase the same property for approximately \$100 to \$150 per acre. After some discussion, Butler and Haggard went to the office of petitioners' attorney. Butler agreed to the suggestion of petitioners' attorney that the transaction be handled by the execution of a "Lease" (under the terms of which petitioners would rent the property for the balance of 1948 for \$10,000 and \$12,000 for the year 1949) and an "Option" (for a separate consideration of \$2,000) under the terms of which petitioners would have the right to purchase the 160 acres after January 1, 1950, and before January 10, 1950, for the sum of \$24,000. Butler was concerned about the possible tax consequences of the proposed transaction, but was assured that the entire transaction was properly reportable for income tax purposes as a sale. Later, on the same day, the parties returned to Merrill's office and the "Lease" and "Option" agreements were executed simultaneously.

The pertinent provisions of the "Lease" are as follows:

To Have And To Hold the same to the said Lessees from date hereof to the 31st day of December, 1949.

And said Lessees, in consideration of the leasing the premises as above set forth, covenant and agree with the Lessors to pay the said Lessors as rent for the same the sum of Twenty-Two Thousand and no/100 (\$22,000.00) Dollars, payable as follows, to-wit: The sum of Ten Thousand Dollars (\$10,000.00) payable upon the execution of this Lease, receipt whereof is hereby acknowledged by Lessors, and the further sum of Twelve Thousand Dollars (\$12,000.00) on the 1st day of January, 1949.

\* \* \* \* \*

It Is Mutually Understood and Agreed that during the term of this Lease, Lessees shall pay all taxes and assessments accruing [sic] against the said property.

\* \* \* \* \*

The pertinent provision of the "Option" are as follows:

That John Butler and Hester D. Butler, husband and wife of Maricopa County, State of Arizona, for and in consideration of the sum of Two Thousand and no /100 (\$2,000.00) Dollars to them in hand paid by D. M. Haggard of Maricopa County, Arizona, receipt of which is hereby acknowledged, hereby give, grant and by these presents do give and grant irrevocably, unto the said D. M. Haggard, his heirs and assigns, the right and option to purchase, acquire, receive and assume possession of the fol-

lowing described real estate and property, to-wit:

\* \* \* \* \*

This Option is given exerciseable [sic] as of the 1st day of January, 1950, and for a period of not to exceed ten days thereafter, and shall be exercised by Notice of Election to purchase hereunder by the said D. M. Haggard or his heirs or assigns, in writing to the said John Butler and/or Hester D. Butler, husband and wife, their heirs, administrators or executors, at least thirty days prior to any day within said eleven day period, and in case said notice shall be given in due time, then the said John Butler and Hester D. Butler agree to immediately execute and deliver a good and sufficient deed to purchaser together with Title Guaranty, \* \* \*

The purchase price for said property is the sum of Twenty-Four Thousand and no/100 (\$24,000.00) Dollars payable upon election to purchase, which said purchase price shall be accepted, received and acknowledged by Sellers in full payment therefor.

\* \* \* \* \*

The property in question was originally purchased by Butler in November 1945, for a total price of \$40,000, \$10,000 down and the remaining balance in annual installments of \$5,000. During 1946 Butler farmed the property, earning a profit of between \$25 to \$30 per acre or \$4,000 to \$4,800 from the entire farm property. The following year he rented out the 160 acres for \$4,000, but was required to pay \$156 in assessments plus taxes and thus obtained a net profit of about \$3,844 for that year. The net profit was less than the annual pay-



ment of \$5,000 plus interest which was due on the purchase price. At the end of 1947, Butler had made a total profit of from \$7,844 to \$8,644 for the two years during which he owned the property. During the same period, he paid the mortgagee \$10,000 plus interest for two years.

In late 1947 or early 1948, the mortgagee was pressing Butler for an over-due payment on the purchase price of the property. To meet this obligation, Butler listed the 160 acres of farm land with a Phoenix realtor at \$48,000. A number of prospective purchasers responded to this listing but none made an acceptable offer to buy until the first week in February 1949. About February 2, 1949, a week before the execution of the "Lease" and "Option" agreements with petitioner, Butler received an offer from the son and son-in-law of one Talby to purchase the property for \$48,000. The terms of the offer were \$8,000 down and the balance in ten equal payments. Before accepting the proposal, Butler, realizing that petitioners owned acreage adjacent to the property, decided to offer the land to them. In the event they were not interested in the "deal," Butler intended to accept the existing proposition. Thereafter, on February 9, 1948, Butler met with petitioners in Phoenix, Arizona, to discuss the "deal." Later that day they executed the "Lease" and "Option" agreements, and pursuant to the "Lease," on that same day petitioners paid Butler \$10,000 as "rent." On January 1, 1949, petitioners paid Butler the other \$12,000 rental payment.

In 1947, the fair or reasonable rental for the property would have been from \$3,000 to \$4,000 a year. In February 1948, the rental that could reasonably have been expected from this property would have been about \$5,000 a year.

On April 1, 1949, Butler borrowed \$12,000 from the Valley National Bank of Phoenix, Arizona, and mortgaged the property as collateral. On the same day, petitioners, as optionees of the property, executed a "subordination agreement" in which they agreed that their option would be subordinate to a mortgage on the property, Butler and his wife being the mortgagors, and the Valley National Bank of Phoenix the mortgagee.

The proceeds of this loan were used by Butler, in part, to pay off the existing mortgage on the property. On January 20, 1950, after petitioners assumed the entire amount Butler owed to the Valley National Bank, and paid Butler the final sum of \$12,000, a warranty deed was executed by Butler conveying title to the property to petitioners.

Following the execution of the "Lease" and "Option" agreements, Butler retained a firm of certified public accountants in Phoenix, Arizona, to prepare his 1948 Federal income tax return. Butler was advised to report the transaction as a sale and on Butler's income tax return for 1948, the "Lease" and "Option" agreements were so treated. One-half of the net gain was reported as taxable.

Petitioners, on the other hand, treated the sum of \$12,000 paid to Butler on January 1, 1949, as

rental expense, payable pursuant to the "Lease," and deducted this amount from their gross income. Respondent determined that this payment constituted an installment on the purchase price of the property, and was not deductible under section 23(a)(1)(A) of the Internal Revenue Code of 1939.

Petitioners, through the annual "rental" payments, were intending to and did in fact build up a substantial equity interest in the 160-acre farm tract.

### Opinion

Fisher, Judge: The respondent has disallowed a deduction of a payment made by petitioners under a "Lease," executed in conjunction with an "Option" to purchase, on the ground that the payment was not rental expense within the meaning of section 23(a)(1)(A) of the Internal Revenue Code of 1939, which restricts deductions to rentals or other payments for the use or possession of property "to which the taxpayer has not taken or is not taking title or in which he has no equity." The sole issue to be decided is whether the so-called "rental" payment was in fact a payment of rent under the lease and deductible as such, or a partial payment of the purchase price of the property. We hold for the respondent for the reasons stated hereinafter.

Petitioners contend that they did not acquire an equity interest in the property as a result of the \$12,000 payment under the lease agreement because the fair market value of the property when the "Lease" was executed was considerably less than the



agreed purchase price under the "Option." They further argue that only the economic relation of the value of the property existing at the time the documents were executed is determinative of the issue here, and that the intention of the parties is only supplemental, if relevant at all. The precise problem posed of characterizing a payment made pursuant to a lease-option arrangement has been before this Court on numerous occasions, and regardless of the form or nomenclature of the transaction, we have treated similar "rental" payments as partial payments of the purchase price of the property involved, if by virtue of the payment the taxpayer has acquired, or will acquire title to or an equity in the property. *Alexander W. Smith, Jr., Executor*, 20 B.T.A. 27 (1930); *Chicago Stoker Corporation*, 14 T.C. 441 (1950). The principle extending throughout the cases heretofore decided by us on like issues is that where the "lessee" as a result of the "rental" payment, acquires something of value in relation to the over-all transaction, other than the mere use of the property, he is building up an equity in the property, and the payments do not, therefore, come within the definition of rent in section 23(a)(1)(A), *supra*. *Judson Mills*, 11 T.C. 25 (1948); *Truman Bowen*, 12 T.C. 446 (1949).

The most recent consideration of this issue was in *Bruce Veneer & Panel Co.*, 22 T.C. 1386 (1954) (on appeal C.A. 7). There, petitioner entered into a "Lease" and "Option to Purchase" agreement with the R.F.C. with respect to certain property, in part of which it was at the time conducting its business.

Under the agreement, petitioner was to pay "as rent" \$100,000 in 60 monthly installments, after which it had the option to purchase the property for \$50,000. The Court held, despite the explicit language of the lease agreement, that since the "rental" payments materially exceeded the current fair rental value of the property, and since the aggregate payments paid prior to the exercise of the option were disproportionate to the relatively small final amount required to acquire title, petitioner was building up a substantial equity interest in the property, as intended by the parties, and that the payments, in reality, were being applied to the agreed purchase price of the property. We are of the opinion that the rationale there expressed is applicable here. *Judson Mills, supra*; *Robert A. Taft*, 27 B.T.A. 808, 812 (1933); *Holeproof Hosiery Co.*, 11 B.T.A. 547 (1928).

We pointed out in *Bruce Veneer and Panel Co.*, *supra*, and *Chicago Stoker Corporation, supra*, that the payments there in question (as in the instant case) may have dual potentialities, that is, they may emerge as partial payments of the agreed purchase price on the one hand or rent for the use of the property on the other. As emphasized in those cases, it is difficult to categorize the payments for income tax purposes. To properly discern the true character of the payment, therefore, it is necessary to ascertain the intention of the parties as evidenced by the written agreements, read in the light of the attending facts and circumstances existing at the time the agreement was executed.

Here, the record shows that Butler had purchased the property in 1945 for \$40,000. In 1948 he was primarily interested in selling it, and listed the property with a realty firm for a price of \$48,000. At the time he contacted petitioners, he had an offer from the Talby group for that amount and was prepared to sell to them on the basis of a down payment of \$8,000 with the balance in ten equal annual payments if he could not arrange with petitioners on more favorable terms at least as to deferred payments. The total sums paid by petitioners precisely equalled the same amount of \$48,000, and we think it clear, upon consideration of the whole record, that at the time the agreements were executed, Butler would not have considered making an outright sale for \$24,000. We likewise think it is clear that the payments in 1948 and 1949 were in excess of the fair rental value of the property and were fixed at amounts which, when added to the option payment of \$2,000 and the ultimate "sale price" of \$24,000, would equal the \$48,000 which Butler demanded.

In support of petitioners' position that they did not acquire an equity in the property as a result of the "rental" payment, they argue that the fair market value was below a reasonable estimate of the property's future worth. They urge that the property on February 9, 1948, had a fair market value not in excess of \$21,750 and the agreed purchase price established by the "Option" was \$24,000. The figure of \$21,750 urged as the fair market value was based upon the testimony of an expert witness pro-

duced by petitioners. An analysis of his testimony demonstrates that the valuation so suggested is not to be accepted as determinative. It is, of course, widely at variance with what both the Talby group and petitioners were willing to pay. The witness pointed out a number of circumstances which might have resulted in greatly differing valuations of the property as a whole, and a variance of as much as 100 per cent in rental value. Moreover, he testified that in valuing the property he had given no consideration to the significant factor of the right to the use of water which was essential to the productivity of the land. His reason for this omission was his assumption that such right was not "appertinent" to the land in question. He made it clear that if such right was appertinent, the value thereof must be added to his valuation of \$21,750. He did not, however, testify what the value of such a right was, and there is no other testimony in the record from which it might be determined, so that we have no basis on his evidence to find a total fair market value including such right.

The burden of proof was, of course, upon petitioners. The record fails to establish whether or not there was a right (appertinent to the land) to the adequate use of water. It is clear from a consideration of the whole record, however, that there was some arrangement for water supply which was satisfactory to petitioners. We add that we think it reasonable to assume that an experienced farmer like Haggard, who was familiar with the particular property, its requirements, and conditions in the



area in which it was located, would not otherwise have entered into the transaction.

In view of the foregoing, we cannot accept the the valuation suggested by the expert witness. On the other hand, while subject in each instance to some deferment of payment, we have a precise amount which two willing buyers were willing to pay, and which Butler, a willing seller, was willing to accept. For the purposes of this case we are not required to determine an exact valuation. No doubt the price of \$48,000 may have been subject to some discount if the entire transaction had been for cash. We think it clear, however, that the value was much closer to \$48,000 than it was to \$21,750. Even if the discount for cash would have been as much as 20 per cent (which we doubt), the payments by petitioners in 1948 and 1949 would have been clearly in excess of fair rental value and would have served to create an equity in the property of which Haggard was in a position to avail himself under the terms of the agreements. We add that, while petitioners' expert witness testified to widely varying potential rental values depending upon varying circumstances, we think that, upon his testimony, the fair rental value, for the practical purposes confronting us, was not in excess of \$5,000 for 1948 or 1949.

A significant aspect of the over-all transaction indicative of petitioners' intent to acquire an equity interest in the property is the fact that, under the lease, the aggregate of the "rental" payments con-

stituted 91 per cent of the purchase price stated in the option. Moreover, the total of annual "rental" payments of \$22,000 is about 46 per cent of the total considerations passing from Haggard to Butler under the terms of the contracts. We think it evident that a rental charge so disproportionate to the term of user in relation to the fair market value of the property is suggestive of the acquisition of an equity interest. Truman Bowen, *supra*, 463.

Petitioners rely strongly upon *Benton vs. Commissioner*, 197 F.2d 745, 751 (C.A. 5-1952). The factual situation in the instant case differs materially from that in the *Benton* case, which, in our opinion, is not here controlling.

In the light of the foregoing and upon consideration of the record as a whole, we are convinced that through the annual rental payments petitioners were in fact acquiring a substantial equity in the property, and that it was so intended by the parties. Accordingly, we hold that the payment in question is not deductible under section 23(a)(1)(A), *supra*, and the respondent did not err in disallowing the claimed deduction therefor.

Decision will be entered under Rule 50.

Served September 28, 1955.

The Tax Court of the United States  
Washington

Docket No. 50625

D. M. HAGGARD and NILA HAGGARD,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed September 28, 1955, the parties on November 7, 1955, having filed an agreed computation of the tax, it is

Ordered and Decided: That there is a deficiency in income tax in the amount of \$3,480.96 for the taxable year 1949.

/s/ MORTON P. FISHER,  
Judge

Entered and Served November 9, 1955.

In the United States Court of Appeals  
for the Ninth Circuit

[Title of Tax Court Cause No. 50625.]

PETITION FOR REVIEW OF DECISION OF  
THE TAX COURT OF THE UNITED  
STATES

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

D. M. Haggard and Nila Haggard, the petitioners in this cause, by W. Lee McLane, Jr. and Nola McLane, their counsel, hereby file their Petition for the Review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States, entered on November 9, 1955, T. C. Docket No. 50625, determining a deficiency in petitioners' Federal income tax for the calendar year of 1949 in the amount of \$3,480.96, and respectfully shows:

I. Jurisdiction

The petitioners on review, at the time of filing of this petition, are citizens of the United States and reside at 1115 West Edgemont Avenue, Phoenix, Arizona. The return of income tax in respect of which the aforementioned tax liability arose was filed by the petitioners with the Collector of Internal Revenue for the District of Arizona, located in the City of Phoenix, Arizona, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The petitioners file this petition pursuant to the



provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

## II. Nature of Controversy

The controversy involves the proper determination of petitioners' liability for Federal income tax for the calendar year of 1949.

On February 9, 1948, petitioners executed two instruments. One was entitled a "Lease" and the other was entitled "Option". Each involved a certain tract of farm land owned by John Butler of Laveen, Arizona. Under the terms of the document designated "Lease", John Butler agreed to let his 160 acres to petitioners until December 31, 1949. The consideration specified by the instrument to be paid by petitioners to Mr. Butler was \$10,000 on February 9, 1948, and \$12,000 on January 1, 1949. The said sums were paid. The document entitled "Option" provided that petitioners thereby acquired an option to purchase the 160 acres for \$24,000 which option could be exercised as of January 1, 1950, and for a period not exceeding ten (10) days thereafter. The consideration required by the "Option" to be paid by petitioners was \$2,000. The sum was paid. Both of the documents were drafted and prepared by petitioners' attorney who was a Mr. J. D. Merrill.

On April 1, 1949, John Butler borrowed \$12,000 from the Valley National Bank in Phoenix, Arizona, giving as security therefor a mortgage on the said 160 acres of farm land. At the same time petitioners executed a document subordinating their

“Option” to the Valley National Bank’s mortgage.

The sum of \$12,000 required to be paid under the terms of the “Lease” agreement during 1949 was claimed by petitioners as a deduction under the authority of Section 23(a)(1)(A) of the Internal Revenue Code of 1939. In January of 1950, petitioners exercised the said option for a purchase price of \$24,000, and acquired the fee title to Mr. Butler’s 160 acres. Respondent disallowed the \$12,000 deduction for the taxable year 1949 in a statutory notice of deficiency dated July 24, 1953, stating that:

“(b) It has been determined that the deduction of \$12,000.00 claimed as rental expense was in the nature of a capital expenditure for the purchase of real estate. Accordingly, the deduction claimed of \$12,000.00 is not allowable as a business expense.”

The Tax Court sustained the respondent’s holding that the \$12,000 was not deductible under Section 23(a)(1)(A) because (1) the amount exceeded the fair rental value of the 160 acres thereby resulting in the acquisition of an equity interest in the property, and (2) the petitioner intended to acquire an equity in the 160 acres.

### III. Assignments of Error

The petitioners assign as error the following acts and omissions of The Tax Court of the United States:

(1) The Tax Court erred in determining that the sole issue was whether the \$12,000.00 payment was in fact a payment of rent.

(2) The Tax Court erred in holding that where a "lessee" acquires "something of value" in relation to the overall transaction, the "rental" payment does not come within the definition of rent in Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

(3) The Tax Court erred in relying on *Breece Veneer & Panel Co.*, 22 T.C. 1386 (1954), (on appeal C. A. 7th).

(4) The Tax Court erred in holding that when rental payments materially exceed the current "fair rental value" of the property "leased" and where the total payments made prior to the exercise of the option are disproportionate to the relatively small final amount required to acquire title, the "lessee" is building up a substantial equity interest in the property, as intended by the parties, and the payments in reality are being applied on the agreed purchase price of the property.

(5) The Tax Court erred in finding that the intention of Mr. Butler and petitioners was to effectuate a sale on February 9, 1948.

(6) The Tax Court erred in finding that the value of the 160 acres on February 9, 1948 was not \$21,750.00.

(7) The Tax Court erred in finding that the fair rental value of the 160 acres did not exceed \$5,000 for 1948 or 1949.

(8) The Tax Court erred in its holding that petitioners did not carry their burden of proof with respect to the fair market value of the 160 acres on February 9, 1948.

(9) The Tax Court treated as evidence the legal

presumption of correctness attaching to the Commissioner's determination.

(10) The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

Wherefore the petitioners pray that the decision of The Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Petitioners on Review

[Endorsed]: T.C.U.S. Filed December 28, 1955.

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In the United States Court of Appeals  
for the Ninth Circuit

[Title of Tax Court Cause No. 50625.]

NOTICE OF FILING PETITION  
FOR REVIEW

To: John P. Barnes, Chief Counsel, Bureau of  
Internal Revenue, Washington, D. C.

You are hereby notified that the petitioners did, on the 28th day of December, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of said Court heretofore rendered in the above entitled case. A copy of the peti-

tion for review as filed is hereto attached and served upon you.

Dated this 22nd day of December, 1955.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Petitioners on Review

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed December 28, 1955.

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The Tax Court of the United States  
Washington

[Title of Cause No. 50625.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit is extended to March 27, 1956.

Dated: Washington, D. C., January 25, 1956.

[Seal]        /s/ J. E. MURDOCH,  
                 Chief Judge

Served: January 26, 1956.



[Title of Tax Court and Cause No. 50625.]

## CERTIFICATE

I, Howard P. Locke, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 13, inclusive, constitute and are all of the original papers and proceedings, on file in my office as called for by the "Designation of Contents of Record on Review" and "Designation of Additional Portion of Record", including Petitioners' exhibits 1 through 9 and exhibit 18 admitted in evidence and Respondent's exhibits A, B, C and D admitted in evidence, as the original and complete record in the proceeding before The Tax Court of the United States entitled: "D. M. Haggard and Nila Haggard, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket No. 50625" and in which the petitioners in the Tax Court proceeding have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appeal in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of January, 1956.

[Seal]      /s/ HOWARD P. LOCKE,  
Clerk, The Tax Court of the  
United States

In the Tax Court of the United States

Docket No. 50625

D. M. HAGGARD and NILA HAGGARD,  
Petitioners,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 9, Federal Building, Los Angeles,  
California, Thursday, March 24, 1955.

The above-entitled matter came on for hearing,  
pursuant to notice to the parties, at 10:00 o'clock  
a.m.

Before: Honorable Morton P. Fisher, J., pre-  
siding.

Appearances: W. Lee McLane, Jr., Esq., of Mc-  
Lane & McLane, 808 Security Building, Phoenix,  
Arizona, for the petitioners.

Arthur Clark, Jr., Esq., (Hon. Daniel A. Taylor,  
Chief Counsel, Internal Revenue Service), for the  
respondent. [1\*]

The Clerk: D. M. Haggard and Nila Haggard,  
Docket 50625. State your appearances for the rec-  
ord, please.

Mr. McLane: W. Lee McLane, Jr., for peti-  
tioners.

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\* Page numbers appearing at top of page of original Reporter's  
Transcript of Record.

Mr. Clark: Arthur Clark, Jr., for the respondent.

The Court: You may proceed.

Mr. McLane: I think Mr. Clark has an exhibit.

Mr. Clark: Your Honor, this case involves a question of substance over form and there may be a conflict as to the testimony. We believe that the witnesses should be excluded and would like them to leave the room.

The Court: Any objection, Mr. McLane?

Mr. McLane: No, sir, no objection.

The Court: All right, Mr. Casey, you will have to use your ingenuity to exclude the witnesses.

The Clerk: All witnesses come with me.

The Court: Mr. Clark, do you have any affirmative testimony?

Mr. Clark: Yes, sir.

The Court: Are your witnesses excluded in the exclusion?

Mr. Clark: Yes, sir.

The Court: All right. None of the gentlemen in the rear of the room are witnesses for either side, is that correct?

Mr. McLane: Mr. Haggard will be a witness, your Honor, but, if it is agreeable, we can hold him until he takes the [3] stand or do you want him out of the room, too?

The Court: I don't know very well how he is going to testify if he isn't in here, so I guess we can hold him. He is going to be your first witness?

Mr. McLane: Yes, sir, he is.



The Court: All right. Proceed with the opening statement.

Mr. McLane: May it please the Court, this case arises out of a difference of opinion concerning the application of that portion of Section 23(a)(1)(A) of the 1939 Internal Revenue Code which allows a deduction for "rentals or other payments required to be made as a condition to the continued use or possession, for purposes of trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity." The taxable year involved is 1949.

Petitioners believe the evidence will show that on February 9, 1948, D. M. Haggard, a farmer, leased 160 acres of farm land from John Butler for the years 1948 and 1949, for a rental payment of \$10,000 and \$12,000 respectively. The evidence will further show that he elected to exercise a written option to purchase the same 160 acres on approximately January 7, 1950, for the sum of \$24,000.

It is petitioners' contention that the sum of \$12,000 paid during 1949 constituted either "rental" or "other payments required to be made as a condition to the continued use or possession \* \* \* of property." Further, they contend that they [4] had neither taken title to the property in 1949 nor were they taking title to it during that year. Thirdly, they submit to the Court that they had no economic equity in the property either on February 9, 1948, during 1949, or on the day just prior to the exercise of the option on January 7, 1950.

Before concluding, counsel desires to respectfully

submit to the Court one additional point. Rule 32 of this Court's rules places the burden of proof on petitioners.

Therefore, it seems only equitable that petitioners should be entitled to some small glimpse, before trial and before briefs are submitted, of what the respondent believes constitutes that burden. To date, respondent has not revealed his view of the facts or the law in any degree.

Petitioners do not know, at this time, whether it is respondent's position that petitioners had an economic equity in the property during 1949 or that they were taking or had taken title to the 160 acres during that year.

Consequently, since this is not a contest between lawyers, but an effort to determine the truth, petitioners' counsel respectfully requests that respondent state, just as petitioners have done, what his view of the facts and law in this case is.

The Court: Mr. McLane, as I understood it, in one year, there was \$12,000 rent paid.

Mr. McLane: Yes, sir.

The Court: And then an option was exercised to purchase [5] that for \$24,000. Was that \$24,000 in addition to the \$12,000 or was the \$12,000 a credit on account of the \$24,000?

Mr. McLane: No, it was not a credit. Actually, there was a lease—strike the word “lease.” I don't want to use that term. There was an agreement entered on February 9, 1948, by which Mr. Haggard was required to pay the sum of \$10,000 for the use of the property during '48. He was also required to

pay the sum of \$12,000 for the year '49, which is the year before the Court. Then, there was an option to purchase exercised—excuse me—granted on February 9, 1948, by which, if he elected to exercise that option, he could purchase the property between January 1st and January 10th of 1950 for the sum of \$24,000, which sum was in addition to the \$12,000 payment made during 1949 and the \$10,000 paid during 1948.

In other words, a total amount of \$48,000 was paid to Mr. Butler.

The Court: \$48,000 or \$46,000?

Mr. McLane: \$48,000, including a \$2,000 option price.

The Court: All right. Mr. Clark?

Mr. Clark: Your Honor, the disallowance of the rental deduction in this case stems from the so-called option and lease agreement that Mr. McLane has described. The respondent's position is that substance and not mere form should be looked to in order to determine whether there was actually a lease and option or whether the entire transaction comprehended a purchase [6] and sale of the premises on February 9, 1948.

The evidence will show that there was an intent on the part of the parties to this transaction to make a sale and to make a purchase. The so-called rental payments made under this contract, this transaction, would, therefore, actually constitute the purchase price of a capital asset and not the payment in the nature of rent within the meaning of

Section 23(a) of the Code in the Internal Revenue Code, 1949.

Respondent may, during the course of this trial, use the term "lease" or "option," or "rental payments." We don't want to be held to have admitted that these are payments under a lease or an option. We will use those terms for convenience only.

We believe that the statutory notice has spelled out the issues in the case quite clearly. We believe that, upon the consideration of the statutory notice, that Mr. McLane could determine the issues.

Mr. McLane: I would like to call my first witness, Mr. D. M. Haggard.

The Court: All right, Mr. Haggard.  
Whereupon,

#### D. M. HAGGARD

was called as a witness by and on behalf of the Petitioners and, having been first duly sworn, was examined and testified as follows: [7]

The Clerk: State your name and address, please.

The Witness: My name is D. M. Haggard, 1115 West Edgemont, Phoenix, Arizona.

The Court: Off the record.

(Discussion off the record.)

Mr. McLane: Mr. Clark and I have agreed to offer up as Petitioners' Exhibit, a certified copy of an agreement entitled "An Option," purportedly executed by John Butler and Hester Butler, dated February 9, 1948. I would like to offer that as Petitioners' Exhibit 1.

(Testimony of D. M. Haggard.)

The Clerk: Petitioners' Exhibit No. 1 admitted in evidence.

(The document above referred to was marked Petitioners' Exhibit No. 1 for identification and received in evidence.)

Mr. McLane: I would like to offer at the same time a document entitled "Lease," signed by John Butler, Hester Butler, D. M. Haggard, and Nila Haggard, dated February 9, 1948, as Petitioners' Exhibit 2.

The Clerk: Petitioners' Exhibit 2 admitted in evidence.

(The document above referred to was marked Petitioners' Exhibit No. 2 for identification and received in evidence.)

### Direct Examination

Q. (By Mr. McLane): Please state your full name and address.

A. David M. Haggard, 1115 West Edgemont, Phoenix, Arizona.

Q. What is your occupation?

A. I am a farmer and a cow rancher.

Q. How long have you been engaged in farming?

A. Thirty years.

Q. Do you own a farm in Maricopa County, Arizona?

A. Yes, at Laveen, Arizona.

Q. Approximately how many acres does it consist of, Mr. Haggard?

A. 1500 acres.

Q. Did you own all of the 1500 acres at the beginning of 1948?

A. No.



(Testimony of D. M. Haggard.)

Q. How many acres did you own at that time?

A. 1340.

Q. When did you purchase the final 160 acres from Mr. Butler?

A. In the first part of the year 1950.

Q. Have you purchased any property in that area since?      A. No.

Q. Had you ever leased the particular Butler 160 acres—strike that. [9]

Mr. McLane: Your Honor, when I use the term “lease,” too, I am not implying or trying to sneak words in that will have any effect at all. I just have to refer to the document some way and I would like to refer to it in that fashion.

The Court: I think we will be able to understand from the record what is intended.

Q. (By Mr. McLane): Had you ever leased this particular 160 acres prior to the purchase in 1950?      A. Yes, the years 1948 and '49.

Q. Prior to executing the lease and option on February 9, 1948, did Mr. Butler ever contact you regarding the possibility of selling the 160 acres to you?      A. What was the question, please?

Q. Prior to executing the lease and option of February 9, 1948, did Mr. Butler ever contact you regarding the possibility of selling the 160 acres to you?      A. Yes.

Q. When was that, Mr. Haggard?

A. When did—I didn't get your question.

Q. When did he first contact you respecting the possibility of selling his 160 acres to you?



(Testimony of D. M. Haggard.)

A. Well, he came to my house early one morning, about 8 o'clock in the morning.

Q. What year? [10]

A. In the year 1948, and talked to me about the 160 acres of land.

Q. Did you tell Mr. Butler that you would buy the 160 acres at that time? A. No.

Q. What did you tell him?

A. I told him that I would lease, rent the ranch from him, that I would pay him \$10,000 for the year 1948 and that I would pay \$12,000 for the year 1949.

Q. Did you also agree to give him an option, I mean, to pay him for an option?

A. I agreed to pay him \$2,000 for an option to buy the farm in the year 1950 for a purchase price of \$24,000.

Q. Mr. Haggard, can you recall the sequence of events on the day that you and Mr. Butler reached an agreement with respect to this particular 160 acres?

A. That is the day that he come to my house in the morning.

Q. What was the outcome of the morning meeting that you just described?

A. Mr. Butler left and went to his home to talk it over with his family.

Q. Did Mr. Butler come back and see you that same day?

A. Yes, he met me in the hotel lobby of the Adams Hotel.

(Testimony of D. M. Haggard.)

Q. What was the outcome of the second meeting in the [11] lobby of the Hotel Adams?

A. Mr. Butler and his wife agreed to rent me their farm for the years '48 and '49 and to sell me the option to purchase for the year 1950.

Q. After that understanding was reached, what did you do then?

A. We went upstairs to talk to my lawyer J. D. Merrill, to draw up the papers.

Q. Did you introduce Mr. Butler to Mr. Merrill?

A. Yes.

Q. Did Mr. Merrill prepare the lease and the option to purchase which are now in evidence as Petitioners' Exhibits 1 and 2? A. Yes.

Q. Did he prepare them on the same day?

A. Yes.

Q. How long after you arrived in Mr. Merrill's office was it before the lease and option were prepared? A. One hour.

Q. Did you and the Butlers wait in Mr. Merrill's office all of the time while the papers were being prepared? A. Yes.

Q. In other words, Mr. Haggard, is it correct to say that from the time you and the Butlers got together in the lobby of the Hotel Adams, neither of the Butlers left your [12] sight until the lease and option were executed?

Mr. Clark: Objection. That question is leading.

The Court: I would imagine you would agree with that, wouldn't you?

Mr. McLane: Yes, sir, I would.

(Testimony of D. M. Haggard.)

The Court: Actually, it is a summary. I will sustain the objection.

Q. (By Mr. McLane): Did the Butlers leave your sight from the time you met them in the lobby of the Hotel Adams until the lease and option were executed? A. No.

Q. Did either Mr. Butler or his wife telephone anyone from the time you met them in the lobby of the hotel until the lease and option were executed?

A. No.

Q. Mr. Haggard, you have testified that you paid \$12,000 for the use of the 160 acres of farm land in 1949. Why were you willing to pay rent of such an amount for 160 acres of land? What were your reasons? A. In the year——

Mr. Clark: Objection.

The Court: Just a moment. What is the grounds of your objection?

Mr. Clark: The question calls for a conclusion on the part [13] of the witness.

The Court: Well, he has used the word "rent." I am not taking it literally as such. I am sure he would be just as willing to ask the witness what was in his mind with respect to the payment of the \$12,000 in 1949, but I don't really feel, Mr. Clark, that that is going to confuse the issue a great deal. There must be some choice of language and I fully recognize that the word "rent," was counsel's word and not the witness' word. I am going to overrule your objection just to make a little progress, but I

(Testimony of D. M. Haggard.)

will assure you I will give attention to that sort of thing in the testimony.

Mr. Clark: Thank you.

The Court: Go ahead. Answer the question.

The Witness: I needed the farm in the year 1949 because I wanted to lease some other adjoining lands out that I could prepare and level the ground and get the ground into hay.

The Court: What is the ground that you wanted to level and get into hay? The ground we are talking about or other ground?

The Witness: No, sir, the ground other than that of the Butler place.

The Court: Ground you already had you wanted to level off and get into hay, is that right?

The Witness: Yes, sir.

The Court: So you wanted the Butler property, you already had it in 1948? [14]

The Witness: Yes, sir.

The Court: You wanted it in 1949 for what?

The Witness: I wanted it to plant cotton on so that I could use the other land that I had to develop and get it ready for this hay crop.

The Court: What did you use it for in '48?

The Witness: In 1948, I raised a grain crop on it. I had a contract with the Capital Fuel and Feed Company to furnish them so much grain and I needed this land in order to fulfill this contract.

The Court: Go ahead.

Q. (By Mr. McLane): Mr. Haggard, did you

(Testimony of D. M. Haggard.)

consider the sum of \$10,000 in 1948 and \$12,000 in 1949 to be high rent?

The Court: Now, just a minute. I can't permit questioning in that form. If the witness rented the property, I suppose it is a question of weight rather than admissibility if he testifies as to what is the fair market value or fair rental value of it during that period, but your question so clearly suggests an answer that I wouldn't be the slightest bit interested in the answer.

Mr. McLane: Strike the question, please.

Q. (By Mr. McLane): When did you first decide to exercise the option to purchase Mr. Butler's 160 acres, Mr. Haggard? [15]

A. In the latter part of 1949.

Q. At the time that you talked with Mr. and Mrs. Butler in the lobby of the Hotel Adams on February 9, 1948, and for years prior to that time, had you ever retained a tax lawyer or an accountant for the purpose of obtaining tax advice?

A. No.

Q. Had Mr. Merrill ever given you tax advice of any kind?

A. No.

Q. Have you ever rented any other farm land for a figure of \$75.00 per acre or more?

A. I have a lease existing right now for these two years.

Mr. Clark: Objection, your Honor. It is immaterial.

Mr. McLane: Your Honor, I am trying to show



(Testimony of D. M. Haggard.)

that the payment of this amount of rent was not unusual for this petitioner.

The Court: It would be a little low, I'd say, for something, and maybe a little high for something else. The farm property that you have mentioned in your question is no foundation to indicate whether it was similar to this or close to it in point of geography or just what relationship it might have.

The question of \$75, whether somebody paid \$75 an acre for farm property would be relevant under some circumstances, but it would have to have some background to indicate any materiality to this case.

Mr. McLane: Well, I had planned to ask him where it was located and what type of land it was.

The Court: Maybe you might ask a few questions like that first.

Q. (By Mr. McLane): Mr. Haggard, have you ever rented any other farm land in the vicinity of the 160 Butler tract?      A. Yes.

Q. How much acreage did you rent?

A. 145 acres.

Q. Approximately where or how far is it from your 160 acres that you acquired from Mr. Butler?

Mr. Clark: Your Honor, I am going to object on the basis that we don't know when this property was rented, whether it is now or just when.

The Court: Well, so far, Mr. Clark, it hasn't made any difference. We don't know when, we don't know whether it was comparable from the standpoint of the soil content or purpose to which it might be used or anything else, but, until we do, it



(Testimony of D. M. Haggard.)

isn't going to be harmful to you in any way anyhow. I think we will make faster progress if we permit these questions. If you want to move to strike them out later, I will consider it in view of the way in which the evidence is being developed.

Mr. Clark: Thank you, sir.

Q. (By Mr. McLane): When was this other 145 acres that you have just described rented, Mr. Haggard? [17]

A. In January of this year.

Q. Would you describe the 145 acres? Would you compare it, rather, with the 160 acres that you acquired from Mr. Butler insofar as soil content is concerned, accessibility to water?

Mr. Clark: Your Honor, may I renew my objection to that? It is too remote. He is testifying to——

The Court: Overruled. Go ahead.

Q. (By Mr. McLane): With respect to its fertility and the other factors that you consider in choosing land to farm.

A. The land is in the same locality and it is comparable in quality of the soil. The water conditions are comparable in cost. Did you ask what I paid for the ground?

Q. That question has been asked and answered before.

The Court: No, I don't think it has.

Mr. McLane: Sorry, your Honor.

The Court: I think it was attempted before but not answered.

(Testimony of D. M. Haggard.)

Q. (By Mr. McLane): What rent are you now paying for the 145 acres of land.

A. I am paying—

The Court: Now, just a minute. There is no use talking about what he is paying now. If you want to talk about what he [18] paid in '48 and '49, if he had it at that time, it may have some relationship.

Mr. McLane: I was going to try to show your Honor that I am—by comparing farm prices we could reach some inference with respect to the reasonableness of the rent at that time.

The Court: Well, if you are going to compare farm prices, then compare them and, after you get through with the comparison, if you establish that they are comparable, then ask him how much he paid.

Q. (By Mr. McLane): Mr. Haggard, are prices that you are receiving for your farm products in the year 1955 as high or higher or lower than the farm prices you received for your products during the year 1948, 1949? A. They are lower.

Q. Now, what rent are you paying for the 145 acres of land which you have just described?

A. \$70 per acre.

Q. Do you have a copy of the lease—excuse me. Strike that.

Do you have an option to purchase that particular 145 acres? A. No.

Q. Do you have a copy of the original of the lease with you at this time? [19] A. Yes.

(Testimony of D. M. Haggard.)

Q. May I see it, please?

Mr. McLane: Your Honor, I offer into evidence as Petitioner's exhibit next in order a lease executed by Garwood, Jones and Emmett Jones and D. M. Haggard, dated 20 January 1955.

Mr. Clark: May I see that, please?

Mr. McLane: Sure.

Mr. Clark: I object to the introduction of this lease. It is dated, made and entered into this 20th day of January, 1955. I think it is too remote from the period of 1948 with which we are dealing.

The Court: What have you to say, Mr. McLane?

Mr. McLane: Your Honor, I am offering it for the purpose of showing that while the amount of money paid by Mr. Haggard for the Butler 160 acres of land may appear on the surface to be rather high, that there are other instances where this particular petitioner has rented similar land for an equal amount of rent where he does not have an option to purchase, and that the amount of rent should be—should not be a factor.

The Court: Well, Mr. Clark, my feeling about the case is this: The evidence that this witness has given and the evidence that is here proposed means nothing whatever to me from the standpoint of a fair rental value of either of these properties. There is, however, in this case, a question of the element of what I might term genuineness. I don't, just as you [20] gentlemen are avoiding terms of one sort or another, I am avoiding any suggestion of good faith, bad faith or anything else. We

(Testimony of D. M. Haggard.)

are trying to determine whether this option and lease are genuine, not in the sense of whether they were genuine between this taxpayer and the other party to the deal, but whether they are genuine from the perspective of the Federal Income Tax law. I think that similar conduct on the part of this petitioner does reflect on it.

I am not attempting to suggest at this time how much weight I will give to what he is saying, but all he is saying in effect, so far as I know, is that in 1955 he paid \$70 an acre for a 140-acre tract that was yielding somewhat less than the yield which he expected back in '48 and '49 and for which he paid, I would assume that the mathematics are \$75 an acre, adding up to this \$12,000.

Now, of course, this is no time to argue the case here but any testimony of this sort has two corridors: One forward and one backward, because it also reflects on the question of why Mr. Butler would want to enter into a transaction of this kind, and why he would want to sell a piece of property for what amounts in practical effect to a two-year rental.

Now, I don't know where all this is going to lead. All I can tell you is that I think that bits of evidence of this sort may reflect on the case. I'd have to hear a great deal more before I could decide. I will reserve you the right to move to [21] strike and argue it in a brief, but I am rather inclined to hear what these witnesses have to say. You can make your objections, reserve your rights, move

(Testimony of D. M. Haggard.)

to strike and argue in the briefs and I may at that time strike it, or I may merely pay no attention to it.

On the other hand, I may give it effect, but my experience is in this type of case that unless we follow some such approach as that, we will never get anywhere. So, at this point, I will overrule your objection, reserving you the right to move to strike and to argue in briefs.

Mr. Clark: Thank you, your Honor.

Mr. McLane: May we have the Court's permission, since the lease is still in effect, to withdraw the original and substitute a photostatic copy?

The Court: Yes, you may substitute a photostatic copy.

The Clerk: Petitioner's Exhibit 3 admitted in evidence.

(The document above referred to was marked Petitioner's Exhibit No. 3 for identification and received in evidence.)

Mr. McLane: If it is agreeable with Mr. Clark, I've made a rough drawing of the property and the area around it, your Honor, if I could turn the blackboard around. Would you like to take a look here, Mr. Clark? It may help you. [22]

Q. (By Mr. McLane): Mr. Haggard, would you please look at this blackboard?

The Court: Before you go into this, off the record.

(Discussion off the record.)

The Court: On the record.



(Testimony of D. M. Haggard.)

Q. (By Mr. McLane): Mr. Haggard, will you take a look at this drawing that I have made on the blackboard of the property in the vicinity of your farm and tell the Court and tell me whether or not, although not to scale, it is an accurate drawing of the tract of land which you now farm?

A. Yes.

Q. Prior to the purchase of Mr. Butler's 160 acres, did you ever purchase any of the farm land adjoining Mr. Butler's 160 acres? A. Yes.

Q. When?

A. Well, I bought the McCallum place which is directly on the south in the year 1944.

Q. And how many acres did that consist of?

A. 400 acres.

Q. And what price did you pay for that 400 acres? A. I paid \$40,000, \$100 per acre.

Q. Did you ever purchase any other property adjoining Mr. Butler's land prior to that date?

A. Yes, in 1946, I bought the 160 acres directly on the east of the Butler 160 and I also bought 540 acres on the south and west of the Butler 160.

Q. Making a total of how many acres?

A. Making a total, I believe, it was 728 acres.

Q. What price did you pay for that 728 acres?

A. Well, it also included a grain crop and I gave \$60,000 in cash and my farm that I had at Eden, Arizona, for that 700 acres.

Q. What was your cost in the farm at Eden, Arizona?

A. Well, I might answer that by saying that



(Testimony of D. M. Haggard.)

Miller Johns sold the farm a few months after they traded from me for \$100,000.

Q. What was the agreed value of the grain crop that you purchased?

A. I paid \$20,000 for the grain crop.

Q. Is there any other property in the vicinity of the Butler 160 acres that you purchased prior to the purchase of Mr. Butler's 160?

A. Just one-half mile east of the Butler 160, I bought 320 acres in the year 1948 from Miller Johns Company.

Q. What did you pay for that 360?

A. I gave \$65,000 for it, including a beet crop that was on it.

Q. What was the agreed value of the beet crop?

A. \$20,000 we paid for the beet crop.

The Court: What does that come down to per acre for the 320 acres?

The Witness: I would figure about 140 acres.

Mr. McLane: I was going to compute the mathematics in brief, your Honor.

The Court: All right, but it is a little bit difficult to follow at this point. I thought the witness could tell me that.

Q. (By Mr. McLane): With respect to the 160 acres directly to the east of Mr. Butler's 160, at the time of purchase of the 160 acres directly to the east of Mr. Butler's 160, was there any difference in the quality or condition of that 160 acres compared with Mr. Butler's 160 acres?

A. Yes.

(Testimony of D. M. Haggard.)

Q. What was that difference?

A. Well, this Miller Johns land had been leveled to grade and it was in condition whereby they had spent \$75 in putting the land in preparation and leveling it, which did not exist on the Butler property.

Q. Was the Butler property leveled when you acquired it?      A. No.

Q. Did you subsequently level it? [25]

A. Well, after I bought it in the year 1950, I leveled it.

Q. What did you pay to level it, per acre, in 1950?      A. \$75 per acre.

Mr. McLane: May I have marked as Petitioner's Exhibit next in order—I just have two or three exhibits, your Honor, and I am finished, a check dated January 1st, 1949, in the sum of \$12,000, signed by D. M. Haggard, made payable to John Butler and Hester Butler. May I have that marked for identification, please?

The Clerk: Petitioner's Exhibit 4 marked for identification.

(The document above referred to was marked Petitioner's Exhibit No. 4 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you——

Mr. Clark: Are you going to introduce the '48 payment also?

Mr. McLane: I have a check for \$10,000.

Q. (By Mr. McLane): Mr. Haggard, I hand

(Testimony of D. M. Haggard.)

you Petitioner's Exhibit marked for identification as——

The Clerk: Four. [26]

Q. (By Mr. McLane continuing): ——4, and ask you that you examine it and identify it, if you can.

A. This is a check I gave to Mr. and Mrs. Butler for rent in the year 1949.

Mr. McLane: Your Honor, I offer Petitioner's Exhibit marked for identification as Petitioner's Exhibit No. 4 into evidence.

The Court: Very well.

The Clerk: Petitioner's Exhibit No. 4 admitted in evidence.

(The document above referred to, heretofore marked as Petitioner's Exhibit No. 4 for identification was received in evidence.)

Mr. McLane: May I have marked for identification as Petitioner's Exhibit 5 an agreement entitled, "Subordination Agreement," dated 1 April 1949, signed by D. M. Haggard and Nila Haggard.

The Clerk: Exhibit 5 marked for identification.

(The document above referred to was marked Petitioner's Exhibit No. 5 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you Petitioner's Exhibit 5 marked for identification—— [27]

Mr. Clark: May we have a chance to look this over?

(Testimony of D. M. Haggard.)

Mr. McLane: Certainly.

Mr. Clark: I have no objection to this.

The Court: Very well.

Mr. McLane: I just asked Mr. Haggard to examine it for a moment. Then I'll offer it in evidence.

I offer Petitioner's Exhibit marked for identification as 5, as Petitioner's Exhibit 5 in evidence.

The Clerk: Petitioner's Exhibit 5 admitted in evidence.

(The document above referred to heretofore marked as Petitioner's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. McLane): Mr. Haggard, would you tell the Court and tell me why this subordination agreement was executed?

Mr. Clark: Objection, your Honor, it is a leading question, calls for a conclusion on the part of the witness.

The Court: Well, I don't think it is leading; as to whether it calls for a conclusion, it seems so far as I can conclude, it calls for a factual answer. If the witness answers otherwise, you can move to strike. I will overrule your objection at this point.

The Witness: Well, in the year 1949, Mr. Butler wanted to mortgage this farm to the bank and borrow some money and the [28] bank, of course, in searching the records, found that I had an option to purchase the farm and they just asked

(Testimony of D. M. Haggard.)

me that if I did purchase the farm if I would assume the loan that Mr. Butler was taking out against it.

Q. (By Mr. McLane): Mr. Haggard, was the transfer of title of Mr. Butler's 160 acres to you handled by an escrow agent in Phoenix?

A. Yes.

Q. Which one?

A. Phoenix Title and Trust.

Q. At what time did that escrow agent deliver to you or your attorney a deed to the property?

A. Sometime in the first part of the year of 1950.

Mr. McLane: May I have marked as Petitioner's Exhibit next in order a document entitled, "Warranty Deed Executed by John Butler and Hester Butler"?

The Clerk: Petitioner's Exhibit 6 marked for identification.

(The document above referred to was marked as Petitioner's Exhibit No. 6 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you Petitioner's Exhibit marked for identification as 6, and ask that you examine it and identify it, if you will. [29]

A. Well, this is a deed that was given from Mr. and Mrs. Butler to me and my wife for the 160 acres in question.

Mr. McLane: I offer as Petitioner's Exhibit

(Testimony of D. M. Haggard.)

next in order, Exhibit 6, which has been marked for identification.

Mr. Clark: No objection.

The Clerk: Petitioner's Exhibit 6 admitted in evidence.

(The document above referred to heretofore marked Petitioner's Exhibit No. 6 for identification, was received in evidence.)

Mr. McLane: May I have marked for identification as Petitioner's Exhibit 7, a check signed by D. M. Haggard, dated 1950, in the sum of \$12,-619.35, made payable to the Phoenix Title and Trust Company?

The Court: How many more items of that sort do you have?

Mr. McLane: That is all, your Honor.

The Court: Certainly items of this type might well have been stipulated beforehand.

The Clerk: Exhibit 7 marked for identification.

(The document above referred was marked as Petitioner's Exhibit No. 7 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you Petitioner's Exhibit marked for identification as 7, and ask that you examine it and [30] identify it, if you will?

A. It is a check I gave to the Phoenix Title and Trust Company to pay Mr. Butler for the balance over and above the amount he owed the bank on the place.



(Testimony of D. M. Haggard.)

Mr. McLane: I offer this as Petitioner's Exhibit next in order.

Mr. Clark: No objection. I do feel, though, if some of the checks go in, they should all go in.

Mr. McLane: I have the checks here for '48, if you want to offer them, Mr. Clark. You are welcome to them.

The Clerk: Petitioner's Exhibit 7 admitted in evidence.

(The document above referred to heretofore marked Petitioner's Exhibit No. 7 for identification, was received in evidence.)

Mr. McLane: That is all.

Mr. Clark: Mr. McLane, have you completed your direct examination?

Mr. McLane: Yes.

#### Cross Examination

Q. (By Mr. Clark): Mr. Haggard, were you familiar with the fact that this property had been offered for sale prior to your deal with Mr. Butler?

A. Yes. [31]

Mr. McLane: The record doesn't show that the property had been offered for sale, your Honor. Objection on that ground.

The Court: Well, the witness evidently understood the question. It is cross examination; leave it in.

Q. (By Mr. Clark): Would you repeat your answer to that, please? A. Yes.

(Testimony of D. M. Haggard.)

Q. You were.

Did you know what price Mr. Butler was asking for this property?

A. No, only by rumor.

Q. Only by rumor. What was the amount of the rumor?

A. Well, I tried to buy the place the year before for \$100, and the year after that for \$150.

The Court: 100, 150 what?

The Witness: Dollars per acre.

Mr. Clark: I would like to have that answer stricken as not responsive to the question.

Q. (By Mr. Clark): Do you recall—what was your understanding that the property was being offered for?

A. I couldn't answer that definitely, because it had been rumored at 100, 150 and up to \$200 an acre.

Q. You testified on direct examination that [32] you had first talked to Mr. Butler directly concerning this deal at your house in the morning. Isn't it a fact that your first conference with him was at the Hotel Adams?

A. No. Well, he was a neighbor. I may have talked to him at the Hotel Adams.

Q. On the day that the transaction took place?

A. No, no. The first thing, he come to my house early in the morning, at 8 o'clock in the morning, and talked to me about the 160 acres of land.

Q. Who is Dan Merrill?

A. That is Daunt, D-a-u-n-t, Merrill.

(Testimony of D. M. Haggard.)

Q. I am sorry.

A. He was my attorney.

Q. He was your attorney. What time of the day was it that you got to Mr. Merrill's office?

A. I'd say about 10 or 11 o'clock in the morning.

Q. Who was present?

A. Mr. Merrill, Mrs. Butler, Mr. Butler, and myself.

Q. Directing your attention to these instruments that were executed on that day, who was required to pay the taxes and assessments on this 160 acres during the time that you were holding the property?

A. You mean during the time of the lease?

Q. I mean from 1948.

A. Well, it is stipulated in the lease that [33] I should pay the taxes in addition to the rent.

Q. And did you actually make those payments?

A. The tax payments?

Q. Yes.           A. Yes.

Q. Were there any buildings on that property?

A. There is a shack.

Q. There was a building on the property?

A. Just a little labor shack, yes.

Q. Now, isn't it a fact that there was insurance, there was insurance on this building at the time that you took over in 1948?

A. I don't know.

Q. Did you carry insurance on that subsequently?

(Testimony of D. M. Haggard.)

A. No. Mr. Butler may have insured the shack when he borrowed the money in 1949. That I can't tell you, from the bank.

Q. Mr. Haggard, you testified that this 160 acres was not leveled at the time you took over the land in 1948? A. Yes.

Q. Is that true? Just when was it that you leveled that property?

A. It was in the spring of 1950.

Q. You are sure of that? A. Yes. [34]

Q. Did you put any fences around this property? A. You mean after 1950 or before?

Q. I mean after 1948?

A. Not until 1950.

Q. Not until 1950. What crops did you plant on this property in 1948?

A. It was planted to barley.

Q. Did you plant anything else in 1948?

A. No.

Q. Only barley?

A. Well, I had two crops of grain, barley in the early part of the season and hygeria in the latter part of the season. I raised two crops on it.

Q. And you pastured part of the land?

A. No, not in 1948.

Q. Did you do so in 1949?

A. No. Well, I might say that I run some cattle on that portion that I didn't have water for. I didn't have it all in crops in '49. I had 90 acres in crops and the rest was left out.

Q. Didn't you have some alfalfa planted?

(Testimony of D. M. Haggard.)

A. No.

Q. Neither '48 nor '49? A. No.

Q. Are you familiar with the soil content [35] of that portion of the property that you testified that you paid 100 per acre for?

A. Am I familiar with it?

Q. Yes. A. Well, I think so.

Q. Isn't it a fact that that soil had a large alkali content?

A. I'd say no more than the surrounding, no more than the Butler place nor the Miller Johns place that joined it.

Q. What was the level of that land in comparison with the other 160 acres?

A. What do you mean by the level of the ground?

Q. In other words, which of it is higher land, looking at the topography of it?

A. It is equal, I'd say.

Q. It is approximately the same level all the way across?

A. I might say that the Butler land is between the river and the McCallum place, but the ground is quite level. I don't mean that it is level from an operating standpoint, but it is level from the slope of the country standpoint.

Q. Now, isn't it a fact that land values generally in the area have increased considerably since 1948? In other words, the price of the land itself?

A. Well, let me answer you this way: The [36]

(Testimony of D. M. Haggard.)

revenue off of the land is less than it was in '48 and '49.

Q. That is not being responsive to the question.

A. In this particular area, I'd say no.

Q. In this particular area, you would say that the land, the price per acre of the land that you would pay——

A. Is not materially——

Q. ——would be less than it was in '48?

A. I didn't say less; I said it hadn't materially increased.

Q. Would you explain the word "materially increased"?

A. Well, I mean that if it is worth \$150 an acre in 1948, it is still worth comparatively that same price. Does that answer your question?

Q. I think it does.

A. I might add, plus the improvements, that's been put on the property. I mean the ground, I spent \$75 an acre levelling it. It's been fenced and improved since that time.

Q. Mr. Haggard, don't you feel——

Mr. McLane: Object to the form of the question, your Honor. I don't think that what he feels is particularly relevant.

The Court: Well, probably not, but let's see what the substance is.

Mr. Clark: I will rephrase the question.

I am not going to ask the question, and no [37] further questions.

The Court: I'd like to ask this witness a few



(Testimony of D. M. Haggard.)

questions. Counsel understand they have just as much right to object to my questions as to those of each other. Mr. Haggard, as I gather it, you knew that this property was for sale prior to the time you entered into this lease and option and that you tried to buy it for \$100, \$150 an acre previously?

The Witness: Yes.

The Court: When it came down to the day on which you and the Butlers decided and went ahead with it, who approached whom?

The Witness: Mr. Butler came to my house, as I stated, early in the morning.

The Court: And Mr. Butler knew you were interested in purchasing it?

The Witness: Well, I'd say he come to try to sell it to me.

The Court: Who mentioned the amounts of the lease, the option and purchase price?

The Witness: Well, I told Mr. Butler that I didn't want to buy the place but that I would rent it because I needed it for the next couple of years for a program that I had outlined, and that I would take an option on it so that if the land, after it showed me what it would do, I might want to buy it. For that reason, I paid for the option [38] for the opportunity to buy it.

The Court: Well, you contemplated using it two years, didn't you?

The Witness: Yes.

The Court: Well, why were you willing to pay

(Testimony of D. M. Haggard.)

on a basis of about \$150 an acre for two years for land which you could have bought outright for \$150 an acre?

The Witness: Well, I needed the land for these particular two years.

The Court: You could have bought it, couldn't you?

The Witness: Well, he didn't offer me this for \$150 an acre. I probably would have bought it, but I don't know that I would.

The Court: Mr. Haggard, before you got through talking either to him or to your counsel, you knew you could buy it for \$150 an acre, couldn't you?

The Witness: If I wanted to exercise the option in the year 1950.

The Court: Mr. Butler isn't going to give you an option to sell at \$150 an acre unless he is willing to sell, is he?

The Witness: That is right.

The Court: So you knew at that time you could buy it for \$150 an acre?

The Witness: Yes.

The Court: And you knew that Mr. Butler [39] wanted to sell then, you were the one that wanted to lease, so you say.

The Witness: Yes.

The Court: What advantage was it to you, if any, to pay \$150 an acre for the two years use of a piece of property that you could have bought for \$150 an acre?

(Testimony of D. M. Haggard.)

The Witness: Well, I might not want it again in two years.

The Court: Well, let's assume you didn't want it. You still would have paid \$150 an acre for using it. You could have abandoned it as far as that is concerned.

The Witness: Well, I ask you to bear in mind that in the year 1948 that I had one of those real good grain contracts. It is a matter of record I had grain sold for \$3 a hundred, \$80 a ton, and I needed the land to produce the grain to fill this contract with. That was for the year 1948.

The Court: Well, it would have produced the grain just as well if you had bought it as if you had leased it, wouldn't it?

The Witness: Well, your Honor, it takes \$24,000 to buy a piece of land if you pay cash for it.

The Court: Well, it took \$12,000 to get a lease and an option, didn't it?

The Witness: That is only half of \$24,000.

The Court: Well, your arithmetic is certainly correct but you knew you were also obligating [40] yourself for another \$12,000 in one year, didn't you?

The Witness: Yes, but I had twelve months to make the money to pay the next lease in.

The Court: You had considerable property at that time, didn't you, Mr. Haggard?

The Witness: Your Honor, sometimes property isn't money.

The Court: Now, answer my question. You had

(Testimony of D. M. Haggard.)

considerable property, didn't you?

The Witness: Yes.

The Court: Had you ever dealt with a bank to borrow money?

The Witness: Yes.

The Court: You ever have any difficulty borrowing \$24,000?

The Witness: Yes.

The Court: When?

The Witness: Well, in my lifetime, many times.

The Court: Well, is it or not a fact that you could have borrowed \$24,000 on the property that you had plus the Butler property in 1948 at a rate of interest which would have been less than \$22,000 for a year and ten months?

The Witness: Your Honor, I owed \$100,000 on the other properties already. It was pretty well mortgaged.

The Court: When you ultimately bought the property in 1950, did you pay cash for the difference between the mortgage and the purchase price or did you borrow it? [41]

The Witness: I paid cash for part of it. I assumed the note against it.

The Court: Well, I understood that you assumed the balance that Butler owed the bank to which you had subordinated your option.

The Witness: That is correct.

The Court: But you produced a check here for \$12,000 and some odd dollars.

The Witness: Yes, sir.

(Testimony of D. M. Haggard.)

The Court: Was that available cash or was it borrowed?

The Witness: It was available cash. I had two pretty good years in '48 and '49, if you remember.

The Court: Mr. Haggard, would you have entered into this lease if you hadn't gotten an option with it?

The Witness: An option to buy?

The Court: Yes.

The Witness: I may have. I might not. I couldn't answer that truthfully. I think I would because I needed that land particularly for those two years.

The Court: All right. Anything further, gentlemen?

Mr. McLane: May I ask——

The Court: Well, I think it is your turn, Mr. McLane.

### Redirect Examination

Q. (By Mr. McLane): Mr. Haggard, did [42] you know when you entered into this agreement with—strike that.

When you entered into this agreement with Mr. Butler to use his land for two years, you knew, did you not, that the sums that you were going to pay him were deductible as rent on your income tax return, or, at least, did you assume that?

A. Yes.

Mr. McLane: That is all.

The Court: Is that all, Mr. McLane?



(Testimony of D. M. Haggard.)

Mr. McLane: Yes, sir, that is all.

The Court: Yes?

Mr. Clark: Would you mark this 1948 income tax return Respondent's Exhibit A?

The Clerk: Respondent's Exhibit A marked for identification.

(The document above referred to was marked Respondent's Exhibit A for identification.)

Mr. Clark: Would you mark this 1949 income tax return as Respondent's Exhibit B for identification?

The Clerk: Respondent's Exhibit B marked for identification.

(The document above referred to was marked Respondent's Exhibit B for identification.)

Mr. Clark: Would you like to see this?

Mr. McLane: Just the '48.

#### Recross Examination

Q. (By Mr. Clark): Mr. Haggard, I hand you a document marked for identification as Respondent's Exhibit B. Can you identify those documents?

A. That is my income tax return for '49.

Q. Is that your signature at the base of it?

A. Yes.

Mr. Clark: Your Honor, the Respondent submits the 1949 income tax return, marked Exhibit B, and requests it be admitted in evidence.

The Court: Very well.



(Testimony of D. M. Haggard.)

The Clerk: Respondent's Exhibit B admitted in evidence.

(The document above referred to heretofore marked Respondent's Exhibit B for identification was received in evidence.)

The Court: I'd like to see that, Mr. Casey.

Q. (By Mr. Clark): Mr. Haggard, I hand you Respondent's Exhibit B for identification—correction: Make that Respondent's Exhibit A for identification.

Can you identify this document? [44]

A. It looks like my tax return for 1948.

Q. Thank you, sir.

Mr. Clark: We submit Respondent's Exhibit A and request that it be admitted in evidence.

Mr. McLane: Would it be out of order to ask for what purpose it is being submitted, your Honor?

The Court: No, I think you have a right to ask.

Mr. Clark: We are submitting this, your Honor, because the Petitioner has entered in \$12,000 as deductions for 1948, claiming it as rent, whereby he has testified that he has paid \$10,000 in rent for 1948. We wish to show that the Petitioner considered the entire \$12,000 as part of the deal.

Mr. McLane: I am not clear what you mean "part of the deal," Mr. Clark.

Mr. Clark: Part of the payment for that year.

Mr. McLane: Part of the payment of what, rent? .

(Testimony of D. M. Haggard.)

The Court: Mr. McLane, whether it proves what Mr. Clark says or not may be a different matter, but I do think it is relevant.

Mr. McLane: No objection then, your Honor.

The Clerk: Respondent's Exhibit A admitted in evidence.

(The document above referred to heretofore marked as Respondent's Exhibit A for identification was received in evidence.)

The Court: I'd like to see that, too.

Mr. Clark: Certainly, sir.

Q. (By Mr. Clark): Mr. Haggard, was the payment made in 1948 of \$2,000 and of \$10,000 made from ready cash? In other words, did you have that money on hand?

A. I really don't remember. I believe I did, but I'm not sure. I may have borrowed it, some of it.

Q. Could you recall if you would have had to borrow the money to make a payment?

A. Well, let me put it like this: If I didn't borrow money for that, I probably borrowed it for making my crops or something else. You see, when a rancher borrows money to operate on, he might use it for various purposes. I borrowed money in 1948.

Q. Would you recall whether you borrowed money for this purpose?

The Court: He said he probably didn't, that he probably paid it in cash, but he wasn't sure.

Mr. Clark: Thank you.

Q. (By Mr. Clark): Mr. Haggard, I show you

(Testimony of D. M. Haggard.)

Respondent's Exhibit A, under the income tax schedules, and an item of rent paid to John Butler, trustee, Phoenix, Arizona, in the amount of \$12,-243. Now, did you pay over \$12,243 in that [46] year under this instrument that is entitled "lease"?

A. I don't believe I understand your question.

Q. I will rephrase the question. I am sorry. Does this figure of \$12,243 reflect in there the \$2,000 that you paid pursuant to the instrument entitled "Option"?

A. Well, that's probably an error in bookkeeping because \$2,000 was for an option. The \$10,000 was for rent.

Q. But you did not pay that much money under the instrument entitled "Lease" during 1948?

A. Well, to Mr. Butler, I think the check was exactly \$10,000 for rent.

Mr. Clark: Thank you. No further questions.

Would you mark these Respondent's Exhibits B and C for identification, or C and D; I am sorry.

The Clerk: Respondent's Exhibits C and D marked for identification.

(The documents above referred to were marked for identification as Respondent's Exhibits C and D.)

Q. (By Mr. Clark): Mr. Haggard, can you identify these?

Mr. McLane: I have no objection to them going into evidence, Mr. Clark, if you are just identifying for that purpose.

Mr. Clark: Thank you. [47]

(Testimony of D. M. Haggard.)

The Court: They will be received in evidence.

The Clerk: C and D in evidence.

(The documents above referred to heretofore marked Respondent's Exhibits C and D for identification were received in evidence.)

The Court: Do you have any further questions?

Mr. McLane: No, sir.

The Court: I think it is a convenient time to recess until 25 minutes of 12.

(Short recess.)

Mr. McLane: Call Mr. John Butler.

Whereupon,

JOHN BUTLER

a witness called by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: John Butler, 120 West Adams Road, Phoenix, Arizona.

Mr. Clark: Mr. Butler, would you speak a little bit louder, please. It is awfully difficult to hear.

Direct Examination

Q. (By Mr. McLane): Mr. Butler, have you been subpoenaed to appear in [48] this proceeding?

A. Yes, sir.

Q. By the Respondent?      A. Yes, sir.

Q. Do you recall the sequence of events which

(Testimony of John Butler.)

occurred, Mr. Butler, on the day that you and Mr. Haggard executed a document entitled "Lease" and a document entitled "Option to Purchase"?

A. Yes, sir.

Q. In Phoenix? A. Yes, sir.

Q. On that day, did you meet Mr. Haggard in any hotel in Phoenix? A. Yes, sir.

Q. Which hotel?

A. In the Adams.

Q. Approximately what time?

A. Oh, I'd say around 9 o'clock in the morning, somewhere around that time of the morning.

Q. After you met him in the lobby of the Hotel Adams, at that time, where did you go from there?

Mr. Clark: Objection, your Honor. It hasn't been established that he met him in the lobby of the hotel.

The Court: Well, he said in the hotel. Where in the hotel did you meet him? [49]

The Witness: I believe it was in the coffee shop.

The Court: All right. Where did you go from the coffee shop?

The Witness: We went up to this lawyer's office.

Q. (By Mr. McLane): Do you recall what his name was, Mr. Butler?

A. His name, according to his lease and everything, was J. D. Merrill.

Q. Was he your attorney?

A. No, sir, I never seen him before.



(Testimony of John Butler.)

A. After you met Mr. Haggard, in the coffee shop of the Hotel Adams—strike that.

From the time you met Mr. Haggard in the coffee shop of the Hotel Adams until the time the lease, excuse me, the document entitled “lease” and the document entitled “Option” were executed in Mr. Merrill’s office, did you consult with any lawyer, tax accountant, or tax attorney?

A. I went back to Mr. Merrill’s office during the noon hour and consulted him about it and he tried to explain to me and he called up some tax man, I don’t know who he was, I don’t remember the name, but he talked to him over the phone and he turned around to me and said I’d just go ahead and report it as a sale, so that’s what I did.

Q. When was the first time you discussed the transaction after you executed the papers in [50] Mr. Merrill’s office?

A. That date.

Q. Well, when after that did you, then?

A. Well, I went back up there during the noon hour, see, and talked to Mr. Merrill and that is what he convinced me was right. In other words, I could do.

Q. That was after you signed the papers or before?

A. No, no, sir, before, during the noon hour, and then I went home and met my wife and we signed the papers and that was it.

Q. When was the time that you discussed the



(Testimony of John Butler.)

transaction with anyone after that particular occasion?

A. I think about a week, I took it up to another lawyer and let him look it over just to see if it was bona fide, in other words, you know. I am pretty dumb myself and I gave this lawyer \$10 to look it over and he said it was all right and he did point out a paragraph in there he would have done a little different, one way or the other, I don't remember what it was.

Q. At that time, did you have an accounting firm preparing your income tax return?

A. Not at that time, I didn't no. I had a lady who had been keeping my books, but she had moved after that calendar year. They had moved down to Missouri, and the next year I moved up to Treadways.

Q. Who is that, now, Mr. Butler? [51]

A. You mean before?

Q. Who is Treadways?

A. Treadway and Associates. They are public, C.P.A., accountant firm in Phoenix.

Q. Did they prepare your '48 Federal income tax return?

A. They prepared the first one in '49, I think. They prepared the first one, I think that year.

Q. Did they prepare the return?

A. Earl Brown prepared my return from the year back, which would be '48, was in January '49, I am pretty sure.

Q. Was it the suggestion of Treadway and As-

(Testimony of John Butler.)

sociates that they report the full amount of the gain of the transaction for the year 1948?

A. Well, I don't remember what was said and all, but Harold just says, "Well, just go ahead and report it as sales; that is what it looks like to me," which he did, and that's all.

Q. Did you realize a loss in 1948 which had the effect of offsetting any gain reported from the Haggard transaction? A. I don't know.

Q. Do you have your return for that year with you?

A. No, sir, I don't have either one of them.

Q. Did you ever tell an Internal Revenue agent by the name of Mr. Ritchie that you wanted to pay some \$800 or \$900 in tax and treat the Haggard payment as rent? [52]

A. We wrangled, I think. It is years ago, last summer, and I think '48, in other words, I don't think I would have had to pay any tax. I didn't pay—I don't think, then, right along there, and I asked my bookkeeper, I says, "How much would it cost me to pay that '49?" See? And he told me about \$900, and I told him, "Let's pay it," and I went away and never seen him for a couple of weeks and, finally, maybe quite a little while after, then he came out to my place to pick up a couple of watermelon and he says, "We won that case. It is all settled." And that is the way I left it. I told him if that is what it takes, I'll pay it.

Q. In other words, that offer was refused?

A. Well, I don't know whatever happened to it,

(Testimony of John Butler.)

but, anyway, they told me it was all cleared.

Mr. McLane: Mr. Clark, is there going to be any objection to the mortgage and the extension and modification agreements?

Mr. Clark: No, I don't believe there will be any objection to that.

Mr. McLane: All right. May I offer as Petitioner's Exhibits next in order, first, a mortgage, dated 1 April 1949, executed by John Butler and Hester Butler, in favor of the Valley National Bank of Phoenix, Arizona?

The Clerk: Petitioner's Exhibit No. 8 admitted in evidence. [53]

(The document above referred to was marked Petitioner's Exhibit No. 8 for identification and received in evidence.)

Mr. McLane: I offer into evidence as Petitioner's Exhibit next in order a document entitled "Extension and Modification Agreement, "dated April 1, 1949, between John Butler and Hester Butler and the Valley National Bank of Phoenix, Arizona.

The Clerk: Petitioner's Exhibit No. 9 admitted in evidence.

(The document above referred to was marked Petitioner's Exhibit No. 9 for identification and received in evidence.)

Q. (By Mr. McLane): Mr. Butler, did you have any heart trouble in 1947?

A. I had a little condition there, went to the

(Testimony of John Butler.)

doctor about six months, wasn't very serious, I don't think.

Q. Did you borrow any money on this 160 acres that was transferred to Mr. Haggard? Did you borrow any money during 1949?

A. 1949, we got an equitable life insurance policy, I mean a loan of \$12,000. There was about, I think, around \$6500 Federal loan *again it* at the time, see. Of course, that was paid off. [54]

Q. Did you receive the proceeds of that loan?

A. Yes, yes.

Mr. McLane: That is all, your Honor.

#### Cross Examination

Q. (By Mr. Clark): Mr. Butler, directing your attention to your meeting with Mr. Haggard in the coffee shop of the Hotel Adams, can you recall any conversations that you had with him at that time?

A. Well, I don't. It's been a long time, but I remember we figured, talked around there, and he said, "Let's go upstairs; see what we can figure out." He said, "We will just try to make a deal with you," something like that.

Q. At the time, did you discuss with him a price for this property?      A. Yes.

Q. Just what did you say to him so far as you can recall?

A. Well, \$48,000 was what I was selling—he asked me what I was selling it for and I told him \$48,000.

Q. And what was his reply to you?

(Testimony of John Butler.)

A. Well, I don't remember because we went upstairs to his lawyer and discussed it there and he started to work on it as well as I can remember.

Q. Was there any discussion as to the [55] matter of taxes at that time?      A. No.

Q. There was not?

A. Not as I know of.

Q. Did Mr. Haggard agree to purchase this property from you there in the coffee shop?

Mr. McLane: Objection to the question, the form of it, your Honor. He asked whether purchase——

Mr. Clark: I asked whether a purchase price was mentioned in that conversation.

The Witness: Well, I——

The Court: I think the question is a little bit misleading, Mr. Clark. It is true it is on cross examination—you can have a little bit more latitude—but this witness has been a rather frank witness, apparently also doesn't know very much about these things. I think you can ask him in a way which doesn't assume such things as a purchase. All he said was that the purchase price, so far as he was concerned, if there had been a sale, was \$48,000. Now, you can go into that as much as you want, but I think it is a little unfair to try to put into his mouth as to whether he would agree to a sale or not. Let him testify to it, rather than to suggest it.

Q. (By Mr. Clark): After you left the coffee shop, Mr. Butler, where did you go? [56]



(Testimony of John Butler.)

A. We went up to this lawyer's office.

Q. Up to the lawyer's office?

A. Yes, sir.

Q. Who was present in the lawyer's office at that time?

A. Oh, this lawyer and Mr. Haggard and myself is the only ones I can recall. There might have been a girl in there but I don't remember, could have been, I mean a stenographer.

Q. Was Mrs. Butler present at that time?

A. No.

Q. And you testified that you left the office and then returned, is that correct?

A. Yes, sir. In other words, it kind of bothered me. I didn't know how it was going to affect my income tax and then I went back up there to get a little information on it and he convinced me, in other words, it was more or less all right, so I went ahead and went on home and got my wife and we come back and signed it, and then next year we reported it as a sale, as a sale in other words.

Q. Did you question the form of the documents?

A. No sir, I didn't because I am not a lawyer and, in other words, I just took the man's word for it.

Q. But after you had executed these instruments, you say then you went and discussed the matter with your attorney?

A. About a week later.

Q. About a week later? [57]



(Testimony of John Butler.)

A. I think it was. I know my father was sick at the time. He died the next two, three days, and, afterwards, I took it over to another lawyer I knew and let him look it over just to see it was all right, in other words. I thought it was, but, just to satisfy myself, it was legal in every way.

Q. Now, you testified, further, that at the end of the year when your income tax return was being prepared that you treated this matter as a sale, is that correct?

A. I didn't catch—you mean——

Q. I will rephrase the question. Did you treat this transaction as a sale on your 1948 income tax return?

A. Well, yes, they filed it as a sale, in other words.

Q. How did you report it?

A. Well, I don't know. The tax men fixed it up. I don't know.

Q. Was there and \$8,000 gain that you reported on your return?

A. Well, yes, if there were.

Q. There was. A. I suppose.

Q. In other words, you based this on the basis——

A. Of \$8,000 gain.

Q. And that \$8,000 gain would be computed how?

A. Well, you show half your profit, don't you?

Q. That is true. [58]

A. We had \$2200, well, went in again that prop-

(Testimony of John Butler.)

erty. I don't know how that was figured in. I Don't know how they figured it up.

The Court: You mean \$2200 or \$22,000?

The Witness: \$2200.

Q. (By Mr. Clark): When did you purchase this property? A. In 1945, in November.

Q. And what did you pay for it at that time?

A. \$40,000.

Q. \$40,000? A. Yes, sir.

Q. Therefore, you treated this as a sale with a sale price of \$48,000 and reported an \$8,000 gain, is that correct? A. I think so.

Q. That was 50 percent taxable, is that correct?

A. You have to pay on half your profit.

Q. That is right. Mr. Butler, what use did you make of this land from the time that you bought it in 1945 until you turned over possession of it to Mr. Haggard in 1948?

The Court: What difference does it make, Mr. Clark? Why do we go into that?

Mr. Clark: Well, your Honor, we wanted to show the rental in comparison values.

The Court: Is there going to be any testimony as to rental values? [59]

Mr. Clark: Yes, sir.

The Court: All right. Go ahead.

Q. (By Mr. Clark): What use did you make of this property from 1945 until you turned it over to Mr. Haggard in 1948?

A. We farmed it in 1947 ourselves and, in 1948,

(Testimony of John Butler.)

I leased my cotton ground all to a fellow named Bunde Strom.

Q. Would you repeat that, please? What year did you farm it yourself?      A. '47.

Q. '47.      A. '46.

Q. Thank you.

A. '47 had it leased to Strom.

Q. And what type of crops did you plant on it in that year?

A. When I farmed it, I had 80 acres of barley and then planted it in hygeria and then had the other 80 acres in alfalfa, was in alfalfa when I bought it.

Q. Approximately what per acre profit did you make off the land in '46?

A. Oh, I made approximately \$25, \$30 an acre, probably.

Q. You say you rented this property to Mr. Bunde Strom?      A. Yes, sir. [60]

Q. In 1947?      A. '47.

Q. And what rental did Mr. Strom pay you for the property?      A. \$4,000.

Q. Which would amount to?

A. \$25 per acre.

Q. How long have you known Mr. Strom?

A. Oh, since about 1934, '35, somewhere around there.

Q. Do you know what his occupation has been since you have known him?      A. Farmer.

Q. He has been a farmer all the time?

A. Yes, sir.

(Testimony of John Butler.)

Q. Did you feel that Mr. Strom—

Mr. McLane: Object to the form of the question, your Honor. If he wants to ask him a question as to fact—he says, “Do you feel”.

The Court: Objection sustained.

Q. (By Mr. Clark): Has Mr. Strom rented or sold other property that you know of in the neighborhood?

Mr. McLane: Your Honor, I must object to that as pure hearsay. The man that has the information is not in Court to be cross-examined. [61]

The Court: What is it directed to, Mr. Clark?

Mr. Clark: I want to show that Strom knew what he was doing, that he was cognizant of land values and rental values.

Mr. McLane: They could have subpoenaed him as a witness, your Honor.

The Court: This witness' assessment of whether Mr. Strom knew what he was doing wouldn't make any impression on me. The concrete facts are that, for one year immediately prior to this transaction, the property brought \$25 an acre.

Mr. Clark: Yes, sir.

The Court: Just what more you want than that is a little difficult for me to see.

You are not trying to prove that Mr. Strom paid more than it was worth, are you?

Mr. Clark: No.

Q. (By Mr. Clark): Mr. Butler, when did you decide that you wanted to dispose of this property?

(Testimony of John Butler.)

A. Oh, about, I'd say, a month before I made a deal with Haggard.

Q. How did you go about offering this property for sale to the general public?

A. Well, I had it listed there for a couple weeks with Griffin Bennett, I believe it was, in Phoenix, a real estate firm, with a fellow named Donald George who was a salesman, in [62] other words. He came out looking for listings and I gave him listings on that.

Q. What was the price that you were demanding for this property?

A. I had it listed at \$48,000.

Q. At \$48,000?           A. Yes, sir.

Q. Was Griffin Bennett the name of the outfit?

A. I believe it was.

Q. Did they produce for you any prospects?

A. I would say they had at least half a dozen prospects but one fellow had a mortgage on an apartment house, he wanted to trade in a first mortgage on an apartment house. Another fellow had 20 acres he wanted to trade in, another had a Ford he wanted to trade in. What I wanted to do was dispose of it, get rid of it. Every two, three days, would call me up—if you are in town, come around, we got a fellow to talk you over. What I was trying to get, the thing, get the money out of it, get it cleaned up as quick as I could.

Q. Did anyone offer to buy this property from you?

A. Fellow named Talby and his brother-in-law.



(Testimony of John Butler.)

Q. When was that offer made?

A. Oh, they was there about a week before this and they came back two or three times and their father called me up and told me that he would sign the paper and guarantee the payments [63] and everything. One of these boys just come back from service a couple years before, both of them was, so far as that was concerned, and \$8,000 he wanted to pay down, according to that, what do you call it there? Says five, but I think it was eight. I thought it was eight at that time. Then the balance of ten equal payments, in other words.

Q. In other words, ten equal payments?

A. He was going to sign the paper to guarantee it and he was worth it.

Q. How long had you known the Talbys?

A. Ever since about 1930. They bought my father's old ranch out there. They were vegetable growers up to the end of the war. Then one of the brothers died and the other one had this son and son-in-law. When they came back, why, he turned everything over to them.

Q. What caused you to contact Mr. Haggard?

A. Well, it was down in that neck of the woods, in other words. I had been in that area and we had put this well in together, you know, three of us, '46, I guess it was, and he had land on both sides up there and I figured he needed it worse than anybody, see, and so before I sold it, in other words, I thought of him and I called him up and asked him was he interested or something and he



(Testimony of John Butler.)

says, "Where are you?" And I says, "I'm home," and he says, "Are you coming to town?" I says, "Yes, I am," or "I can," one of the two; he [64] says, "I will be down to the Adams Hotel in a little while; come in," or "We will get together," or "I'll see you," something like that, and we got together and started the deal.

Q. What was the total amount of the total business offer? A. The \$48,000.

Q. \$48,000? A. Yes.

Q. Was it your intention to sell the property at that time? A. Yes.

Q. It was?

A. Yes, I was going to sell, in other words.

Mr. McLane: Would you pin that, Mr. Clark? By "at that time," are you referring to Mr. Talby?

Mr. Clark: Well, we will clarify it.

The Court: I think the witness was clearly referring to Mr. Talby at that time.

Q. (By Mr. Clark): Did you intend to sell this property when you consummated this deal with Mr. Haggard? A. Yes.

Q. You did?

A. If I hadn't went that deal that day, I would have went in escrow with them.

Q. By "them," you mean the Talbys? [65]

A. Yes, sir.

Q. Would you have considered selling this property for \$24,000? A. No, sir.

Mr. McLane: Object to that as speculation, your Honor.

(Testimony of John Butler.)

The Court: Overruled.

Q. (By Mr. Clark): Would you have sold this property for any other price than \$48,000?

A. No, sir.

Q. Can you explain to the Court why it was that these instruments were drawn up the way they were rather than as a straight purchase agreement?

A. Well, sir, I don't know myself, in other words.

Q. Directing your attention to Petitioner's Exhibits 8 and 10, to Petitioner's Exhibit 8 in particular, can you identify that instrument?

A. That is the mortgage we made, isn't it?

Q. Is that the mortgage for the loan that you made in 1949?

A. Well, it must be, Valley Bank.

Q. Thank you. Can you explain to the Court just what transactions took place between you and Mr. Haggard in connection with this mortgage?

A. Well, along in that spring there, my [66] boy was building a little house and I run out of money and I needed some money and I figured I had a little equity down there and I called him up and asked him about putting it in the Equitable Life Insurance loan for \$12,000, or maybe I went out to see him. I don't know whether I talked to him over the phone or not and I went out to see him and met him out at the fair ground and I talked to Mr. Gallin down at the City Bank, about it, and so Mr. Haggard went in his office and called up Mr. Gallin and talked to him about it and I

(Testimony of John Butler.)

went on down and put the loan through. I don't know what the conversation between Mr. Haggard and Mr. Gallin, I didn't hear, but I got about \$5500—\$600 after they paid the National Farm Loan Association loan off, you see.

Q. Was there an existing mortgage on the 160 acres?      A. Yes.

Q. Was that mortgage existing at the time on February 8, 1953—February 9, 1948?

A. Yes.

Q. And did you pay that mortgage off?

A. I paid off, sure.

Q. Out of the proceeds of this \$12,000?

A. Yes, sir.

Q. And did Mr. Haggard agree that he would, either then or sometime in the foreseeable future, assume this mortgage of \$12,000? [67]

A. Well, I understand—that is what they told me down at the bank. Mr. Gallin told me it was all right, go ahead and put it on there and he would assume it, in other words.

Q. Did you at any time make any payment on that \$12,000 obligation?      A. No.

Q. Directing your attention to the latter part of 1949 or the early part of 1950 when the deed—over to Mr. Haggard was made, did this assumption of this mortgage for \$12,000 constitute a part of the consideration for purchase of the property?

A. Well, yes, it was a final payment. In other words, final of that \$24,000, last \$12,000, in other words.

(Testimony of John Butler.)

The Court: It is perfectly obvious it was deducted from the purchase price. There wasn't any dispute,——

Mr. McLane: Mr. Haggard testified, your Honor.

The Court: ——about that, and I would say it would be impossible for there to be any question about that.

Mr. Clark: Yes, sir.

Q. (By Mr. Clark): Mr. Butler, did you pay any assessments or anything at all toward the property?

A. Nothing.

Q. After 1948, February 1948?

A. Nothing that I remember.

Q. Directing your attention to the sketch on the [68] blackboard, it is obvious that the 160 acres is adjacent to the road. During the period of 1948 to 1950, did you ever travel on that road in your automobile?

A. Which is that? You mean around the place?

Q. You see the area marked "road" at the top there?

A. Yes.

Q. Did you travel that road at all?

A. Not very often; once in awhile, once or twice a year, go down to the reservation, go down, turn south there, go down to the reservation, but not very often.

Q. Did you ever notice any activity on that piece of land during that period?

A. Well, one time I was going by there, somebody was farming it, somebody was really farming it. Mr. Haggard's brothers, they are good farmers.

(Testimony of John Butler.)

Q. Do you recall seeing any improvements being made on the land?

A. Well, I noticed—I don't know when it was, that first year or second year—they had overhauled the rest of the fence around and maybe it's been done since, I don't remember, and, anyway, they leveled, did some leveling on the west side. I saw some caterpillars in there. I believe it was fall or summer, one or the two, and they was planting alfalfa.

Q. Can you pinpoint the time on that?

A. I don't know whether it was '48 or '49 or where. I [69] know they did some work on it, had a nice stand of alfalfa on it there.

Q. Was it either in '48 or '49?

A. Well, I don't know. I can't remember whether it was one year or the other, but I believe it was either the first year or the second year. Now, I could be wrong.

Q. Was that before the deed was issued to Mr. Haggard?

A. Well, I believe it was. Now, I don't know. I can't remember now. This thing came up a couple of years ago and all of that stuff, you know, I can't remember whether it was '48 or '49 or '50.

Q. Did you carry any type of insurance on this property after February of 1948?

A. Well, there was an insurance policy on this little house down there, but I don't remember even giving it to him or whatever happened to it. I don't know.



(Testimony of John Butler.)

Q. Did you pay any premiums on that insurance? A. Not since.

Q. Mr. Butler, were you familiar with the land values in the immediate neighborhood?

Mr. McLane: Objection, your Honor. If he is going to have him testify as to the fair market value of land. He hasn't qualified him.

The Court: All he asked him now is whether he knew land values. I don't know what his answer is going to be. He [70] hasn't asked him anything except what might relate to his qualifications. If you object on the ground that it is not proper cross examination, I will sustain it and there is certainly nothing in direct examination that had anything to do with this witness testifying as to the land value, but it is up to you as to whether you want to object or not on that ground.

Mr. McLane: I will object, then; it is not within the scope of direct examination.

The Court: Objection sustained.

Q. (By Mr. Clark): Mr. Butler, did you rent any other real estate in that area during the years '46, '47, and '48?

A. I rented 240 acres in the fall of '45, I believe, for five years for \$15 and assessments. Assessments cost around seven, seven-and-a-half, eight dollars if I have two acre-feet of water. Otherwise, I have paid the assessments.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.



(Testimony of John Butler.)

The Witness: Then, in 1950, I bought half of that 240 acres and released the other back for \$30 an acre the first year, \$27.50 the second year, and \$25 the third year. That was in '53, and I released it back last September, a year ago, for \$30, \$3600, \$120 a year for last year, this year, and next [71] year.

Q. (By Mr. Clark): How does that property compare with the 160 acres under consideration here?

A. Oh, it is all in the same area except this land here is down in a little valley to itself down there.

Q. Is this land as valuable as the 160 acres?

Mr. McLane: Objection, your Honor, on the ground it is not within the scope of direct examination.

The Court: Objection sustained.

Mr. Clark: No further questions.

The Court: Mr. Butler, I think you testified that when you got together with Mr. Haggard on the morning when these papers were drawn up, that it was your idea to sell this property for \$48,000.

The Witness: Yes.

The Court: Is that what you testified to? Between the time you were in the coffee shop together and the time you got to Mr. Merrill's office, were you and Mr. Haggard continuously together?

The Witness: Until we went up to the office, yes.

The Court: Can you tell me why or wherefore or just what happened, if you know, as to how this got changed over from a \$48,000 sale to a lease for

(Testimony of John Butler.)

\$10,000 for a little less than the entire year '48, \$12,000, '49, \$2,000 option and \$24,000 [72] purchase price? What happened, if you remember, that moved it from one to the other?

The Witness: I discussed it, they discussed it.

The Court: Who discussed it?

The Witness: Mr. Merrill, Mr. Haggard, and myself, and they agreed and I agreed to it at that time that way.

The Court: Well, who suggested it, do you know?

The Witness: I don't remember.

The Court: Did you suggest it?

The Witness: No, sir.

The Court: Did you question it?

The Witness: No, sir, I didn't then, but still, though, it wasn't clear in my mind.

The Court: And Mr. Merrill was Mr. Haggard's lawyer?

The Witness: Well, I don't know if he was his or not. We both went up to this lawyer.

The Court: At whose suggestion?

The Witness: Mr. Haggard's.

The Court: Did Mr. Merrill ever do any work for you prior to that time?

The Witness: No, sir.

The Court: All right. That is all I have to ask him. Any redirect?

Mr. McLane: Yes, sir, I have a few more questions. [73]

(Testimony of John Butler.)

Redirect Examination

Q. (By Mr. McLane): Mr. Butler, when you leased the property to Mr. Strom in 1947 for the sum of \$4,000, did you pay the taxes and assessments?

Mr. Clark: Objection.

The Court: Overruled.

A. I paid the taxes and assessments, I believe.

Q. (By Mr. Clark): Do you recall how much they were?

A. Oh, I think the assessments was about \$1 an acre, \$156, something like that. Now, it wasn't too bad, the taxes wasn't too bad. I don't remember what they were.

Q. Do you have any idea what the taxes were?

A. No, sir, I can't remember.

Q. So that you got the \$4,000 lease, the taxes and assessments, is that correct?

A. That's right.

Q. Who did you purchase this 160 acres from?

A. From Clyde Ewalt.

Q. What were the terms of the purchase?

A. Oh, I was paying—I paid—I don't remember what I paid down, but I assumed this Federal loan, see, and I was carrying it and I was paying them \$5,000 a year plus the interest. [74]

Q. Isn't it correct that you paid nothing down, Mr. Butler?

A. No, I paid \$10,000 down, I think.

Q. And what were your payments each year?

(Testimony of John Butler.)

A. \$5,000.

Q. Did that include interest?

A. No, plus the interest.

Q. Why didn't you accept the offer of Mr. Talby for the sum of \$48,000?

A. Well, Mr. Ewalt, I'd seen him a little while before then and he was going to build an apartment house up in San Francisco. He worked for the John J. Plough Company. So, in other words, he'd like to get this money out of this deal as quick as he could so he could go ahead with this apartment house. He had been tied up there during the war and he had some money tied up to go in this deal so he wanted to get his money out of this so he could put it in this apartment house as soon as he could. I had a couple of friends, one of them was a banker and another was a man who was head of a big co-op there, and I served 13 years on the board of directors of this co-op, and they told me, they kept arguing to me, they said, "If you owe any money, you better get yourself into shape because this thing is going," so I got, and I had a boy just come back from the Army and he was in college——

The Court: Now, gentlemen, what are we getting into now? [75]

Mr. McLane: Your Honor, I am trying to show here that Mr. Butler did not accept that offer for a good reason, that he was in need of cash and couldn't get it under terms of that agreement and that is why the down payment was very minor and

(Testimony of John Butler.)

it was to be paid, as he has already testified, in ten annual installments, and for that reason——

The Court: All right. Go ahead.

The Witness: (Continuing) In other words, I was anxious to get this money out just as quick as I could so I could pay Mr. Ewalt his money and that is what I did. And another thing, I knew he has this other land down there and I wanted to see him get this all because he needed it all.

Q. (By Mr. McLane): In other words, you wanted to get your money out fast?

A. That's right.

Q. You testified——

Mr. McLane: Just a question or two more, your Honor.

Q. (By Mr. McLane): You testified that, as I recall, you made about \$25 or \$30 an acre on the property in 1946?

A. Somewhere around that figure, something like that, made about a ton of grain. Now we make two tons.

Q. That is approximately \$4500?

A. Somewhere around in there.

Q. You had payments to meet of what? [76]

A. \$5,000.

Q. Plus interest?                      A. Yes, sir.

Q. And did that \$4500, was that net to you or did you have deduct from that your taxes and assessments and so forth?

A. I don't remember. I remember I went out to the old mill and got this \$5,000 and paid my pay-



(Testimony of John Butler.)

ments first of January. In other words, I got an advance in '48 and then when I got this first check I went and paid it back and paid Ewalt off then right away, got his out of the way.

Q. Mr. Butler, when the transaction was proposed to you by the Talbys of, say, \$8,000 down, as I recall, and the balance over a period of ten years, you are a farmer of long standing, isn't the effect of such a sale that the purchasers buy your farm out of the profits of the farm?

A. Well, yes, that is the way a lot of us buy, out of profits.

Mr. McLane: That is all.

#### Recross Examination

Q. (By Mr. Clark): Mr. Butler, how much did you owe to Mr. Ewalt?

A. I think around \$22,000. I am not sure.

Q. About \$22,000?

A. Somewhere around there. [77]

Q. And you used the first payment that was made by Mr. Haggard as part of that obligation, is that correct?

A. Well, he got his money out of this \$24,000, and he got it all in twelve months after the deal we made.

Q. And that is the \$24,000 paid in '48 and '49 or in 1950?

A. '48 and '49 and this 1950, he assumed \$12,000 and I got \$12,000. In other words, I had to sign

(Testimony of John Butler.)

it over to the Valley Bank for a home in other words. They got it.

Mr. Clark: Yes. Thank you.

Further Redirect Examination

Q. (By Mr. McLane): Mr. Butler, did you discount the debt that was owing to Mr. Ewalt at that time? A. No, sir.

Q. You paid him the full amount?

A. Plus 6 percent.

The Court: All right. Thank you, Mr. Butler.

The Witness: How long am I going to be tied up?

The Court: If counsel are willing—as far as I am concerned, you can be excused now.

Mr. Clark: Does counsel want Mr. Butler to remain for any reason?

Mr. McLane: No.

The Court: Very well. You are excused. [78]

(Witness excused.)

Mr. McLane: May I state for the record here what I propose to do? What I would like to do here, if it is agreeable with Mr. Clark, your Honor, is to attempt to qualify this witness as an expert for the purpose of appraising farm lands in the area in which this particular land was located and at that time ask, as is recommended by Mr. Tracy, what his opinion is of the fair market value and then, instead of going question by question what the basis for that opinion is, offer into evidence a

report which he has prepared stating the basis for his opinion.

I thought, in that way, possibly Mr. Clark would have time to examine it and we could avoid the necessity of my questioning him one by one.

The Court: Give Mr. Clark a copy of it and see whether he is willing to do that.

Mr. McLane: This is nothing novel, I don't think, your Honor. Mr. Neblick did that at one occasion.

The Court: I am not shocked by it, Mr. McLane.

Mr. McLane: Of course, it would be understood, your Honor, anything that appears in here is open to cross examination.

The Court: I have that in mind.

Mr. Clark: Your Honor, I think we are going to object to the introduction of this appraisal. We have never seen [79] this before and it takes consideration on it.

The Court: Mr. Clark, nobody is attempting to force you into anything, but if this witness is going to testify at great length, it is going to make a long record. Now, I am perfectly satisfied to have this witness go on with his qualifications and I am perfectly satisfied to extend the noon recess for such reasonable amount as may be suggested for you to examine this report. It is pretty obvious that whether the report goes in or not, the witness is going to testify substantially to what is in it, and the only problem will be whether what is in it is admissible or not.

I am willing to give you plenty of opportunity

to look at it and it probably will be one of the most convenient ways for you to note your questions on cross examination. If you feel that, under all circumstances, you will be unalterably opposed to having the report come in, even subject to objections, then we will have to go on with the witness.

But I will give you plenty of time to examine it before you make your decision.

Mr. Clark: Thank you, sir.

The Court: All right. Go ahead with your qualifications. We can get that out of the way probably in a few minutes and then we can recess for lunch. Whereupon,

WAYNE M. AKIN

a witness called by and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Wayne M. Akin, 801 North 1st Avenue, Phoenix, Arizona.

The Court: I am sorry. I didn't get the spelling of your last name.

The Witness: A-k-i-n.

Direct Examination

Q. (By Mr. McLane): What is your present occupation?

A. I am a professional appraiser and president of the Western Farm Management Company.

(Testimony of Wayne M. Akin.)

Q. How long have you held the job as president of Western Farm Management Company?

A. Since 1934.

Q. Please state the extent of your college or your education.

A. I have approximately 6 years of college training in the University of Pennsylvania and Colorado A & M College, Bachelor of Arts degree or Bachelor of Science degree, excuse me, in 1918 and Master of Science degree in 1925.

Q. What were the major courses of study during that [81] period of time?

A. At the Horton School of Finance and Commerce at the University of Pennsylvania, I studied business finance and business administration, taking some courses in animal husbandry in the veterinary school at the University. My major at Colorado A & M was in animal husbandry with post-graduate work in agronomy and education.

Q. After your graduation from college and prior to the year 1934 when you testified you became head of Western Farm Management, what was your occupation or business?

A. I was in the United States Army for a little over a year, and I went in business as a real estate and loan business, mortgage loan business, abstract business, later selling that out; became Smith-Hughes agricultural teacher, and then superintendent of schools at La Porte and Buena Vista, Colorado for some eight or nine years, and then organized a business of visual and auditory aids



(Testimony of Wayne M. Akin.)

to education for two years, and then organized the Western Farm Management Company.

Q. During the period that you just described, were you ever called upon for a fee to make appraisals for the purpose of making loans or settling estates or for any other purpose? A. Yes.

Q. Appraisals of what type of property?

A. Farm and ranch property.

Q. Are you presently a director of any corporation? [82] A. Yes.

Q. Which one?

A. Well, Western Farm Management Company and the Mountain States Telephone-Telegraph Company.

Q. Are you presently chairman of any interstate stream commission or any organization of that sort?

A. Yes, I am chairman of the Arizona Interstate Stream Commission.

Q. Mr. Akin, what is the primary business of Western Farm Management Company?

A. The management and operation of agricultural properties, ranch and farm.

Q. How many do you manage and operate approximately?

A. At the present time—let's do a little checking. We are operating about 3,000 acres of irrigated land and ranches, involving approximately 2500 cattle.

Q. In the course of your work with Western Farm Management, have you ever been retained for

(Testimony of Wayne M. Akin.)

pay to make appraisals of farm property?

A. Yes.

Q. Would you name briefly some of the persons or corporations for whom you have or presently do appraise farm property?

A. Well, in the field of loans, we have done extensive appraising for the Connecticut Mutual Life Insurance Company [83] and the Northwestern Mutual Life Insurance Company, Valley National Bank of Phoenix, First National Bank of Phoenix, the Deseret Livestock Company in Salt Lake, the Tovrea Land and Livestock Company, Phoenix—how many do you want? There are innumerable small——

Q. Are you an accredited rural appraiser?

A. Yes.

Q. Will you explain to the Court what the requirements are for membership as an accredited rural appraiser?

A. Well, accrediting is done by the American Society of Farm Managers and Rural Appraisers. It is a professional organization, the design of which is to undertake to qualify appraisers before the public with a control that is comparable to C.P.A.'s. In other words, to qualify for the examination, it is necessary to—the applicant must have had a degree in agriculture from a recognized agricultural institution of higher learning, must have made a minimum of 250 appraisals for which he is paid a fee, including a written report to the client, must subscribe to the ethical standards of the so-

(Testimony of Wayne M. Akin.)

ciety and then take a three-day written and oral examination conducted by a board of examiners consisting of three professors of accepted agricultural institutions and two accredited rural appraisers and, having successfully passed the examination, qualifying as indicated, the Society issues certification.

Q. Have you ever held office in any societies of [84] appraisers?           A. Yes.

Q. Which one?

A. I have been president of the American Society of Farm Managers and Appraisers.

Q. What year?           A. 1954.

Q. What is the Range Appraisal Committee?

A. About 1949, the Society appointed a committee of representative appraisers throughout the western states for the purpose of undertaking to bring in to order a uniform pattern, relatively uniform pattern of appraisals for ranches, particularly those involving large quantities of public lands, and the Commission worked over a period of two years organizing a pattern for appraisal.

Q. Have you ever held office with that committee at any time?

A. I was chairman of that commission.

Q. What is the total number of years experience you have had in appraising farms?

A. I began appraising farms professionally in 1919 and then intermittently, as I have indicated, since.

Q. How many appraisals for pay of farm prop-

(Testimony of Wayne M. Akin.)

erty do you estimate that you have made during that period of time?

A. I wouldn't know how to go about it. As I remember, [85] when I was examined as an accredited appraiser, I had then made something over 300 appraisals and I made a lot since.

Q. Referring to the appraisal of the Johns Ranches, Inc., approximately what was the amount of property involved in that appraisal?

A. About two million and a half.

Q. And by whom was that appraisal made?

A. It was made for the Valley National Bank.

Q. You mentioned Deseret Livestock Company. Approximately what was the amount involved in that appraisal? A. About three million.

Q. For whom was that appraisal made?

A. That was made for the Deseret Livestock Company.

Q. You mentioned the Tovrea Land and Cattle Company——

The Court: I don't think we have to go into any more of those.

Mr. McLane: All right.

Q. (By Mr. McLane): How many appraisals have you made of farms in the 160 acre class?

A. Well, there would be hundreds. I wouldn't know.

Q. Mr. Akin, what fee did you receive for making the Johns Ranch Enterprises appraisal?

A. \$5,000.

Q. Were you asked by me and by Mr. Haggard

(Testimony of Wayne M. Akin.)

to make an [86] appraisal of the Butler 160 acres involved here as of February 9, 1948? A. Yes.

Q. Have you done so? A. Yes.

Q. What was the agreed fee that you were to be paid by Mr. Haggard? A. \$500.

Mr. McLane: Your Honor, I have reached that point.

The Court: Of course, Mr. Clark, you will understand that no one is suggesting that you admit the correctness of what is in this report. It is merely a question of whether you are willing to facilitate proceedings by admitting that the witness would testify to what is in the report, and my proposal is to recess for lunch at this time until 2:15. If you need any further time to examine the report, I will grant you additional reasonable time and the Clerk will send for me when you are ready.

Otherwise, I will be ready to resume at 2:15.

Mr. Clark: Thank you, sir.

(Whereupon, at 12:15 o'clock p.m., the hearing was recessed, to reconvene at 2:15 o'clock p.m., same day.) [87]

Afternoon Session—2:15 o'clock p.m.

Whereupon,

WAYNE M. AKIN

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. McLane): Mr. Akin, were you familiar with the 160 acres owned by Mr. Butler in 1948 at any time prior to 1948?



(Testimony of Wayne M. Akin.)

A. Yes, I have known the property for a good many years prior to that time.

Q. Did the Western Farm Management Company at any time ever actually farm the same land?

A. Farm the subject property?

Q. Yes.            A. No.

Q. Did you farm land in the vicinity?

A. Yes.

Q. Which land did you farm in the near vicinity?

A. The land that, on the map here, is marked, this Miller Johns 728, and the 320, we farmed for two years, I believe.

Mr. McLane: Now, as I stated, your Honor, I am going to ask this question and then offer the report in evidence.

Q. (By Mr. McLane): Mr. Akin, what, in your opinion, was the fair market value of Mr. Butler's 160 acres farm land on February 9, 1948?

A. \$21,750.

Mr. McLane: Your Honor, I now offer in evidence the report prepared by the witness stating the foundation upon which that opinion is based.

Mr. Clark: Your Honor, we will have to object to the introduction of this summary in evidence on the basis that it is a summary, does not give the Respondent an opportunity to object to the admissibility of the statements contained in it at the time they are going in, appears to be based in part on hearsay evidence and we feel that the best evidence

(Testimony of Wayne M. Akin.)

in the matter would be in the direct testimony from the witness.

The Court: Have you anything further to say, Mr. McLane?

Mr. McLane: No, sir, your Honor.

The Court: Very well, I will sustain the objection.

Q. (By Mr. McLane): Mr. Akin, what are the factors which are considered by you in appraising the value of farm land in the vicinity of Mr. Butler's 160 acres?

A. The farm land in Central Arizona, where the production of crops is entirely dependent upon irrigation, is primarily dependent upon the water supply. There is a lot of good land with relatively little variation in it, but there is a lot of variation in the water supply and, therefore, in [89] undertaking to establish the value of land, the first consideration is the availability in amount and cost of the water supply, the quality of the water which has a very important bearing on its usability and the crops that can be raised and its permanence and the fourth factor that is largely determining is, then, the quality of the land as such.

Of course, the price at which comparable land moves is very important.

Q. Did you actually physically view this property at the time you made the appraisal?

A. I made the appraisal in 1955, reconstructing conditions as of 1948.

(Testimony of Wayne M. Akin.)

Q. Could you give us a description of the subject property in terms of the geography?

A. Well, the subject property is located some 11 miles from downtown Phoenix, about four miles south and seven miles west, at which point the Gila and the Salt Rivers are approaching each other forming a peninsula and this property, this area generally is known as the Peninsula Country and has been in cultivation for many years.

Q. Is the water used by the property derived from the river that you mentioned, the Gila?

A. No, the water is now derived from pumps operated for the benefit of this area by the Salt River Valley Water Users Association. This land was put into cultivation early in the [90] century, in fact, late in the last century, and it is by direct diversion from the river. When the Salt River Project was put into effect and the water was dammed and diverted, it meant that the water that normally came down through these old ditches was cut off and, since it was cut off by the Water Users Association, they were under obligation to do something about it.

After considerable controversy, this land, largely having gone into the hands of one of the banks, Valley Bank and Trust Company as it was known at that time, predecessor of the Valley National Bank, negotiated a contract with the Salt River Valley Water Users Association, under the terms of which the pumps were to be operated for the use of this land.

(Testimony of Wayne M. Akin.)

There are some significant things in connection with that contract, one of which is that this was water-logged land, largely gone back to alkali waste. A drainage program was set up. Without going into the details of it, part of the consideration was the putting in of these drainage pumps for the relief of this area, supplying the water to a lower irrigation district known as the Roosevelt Irrigation District, and hence by exchange some water was allocated to this land.

By this means, the total water supply furnished was approximately three-and-a-half acre feet per acre. In addition to the three-and-a-half acre feet, the land owners had [91] the privilege of buying additional water insofar as the pumps would supply it. I don't know how much farther you want me to go in the discussion of this thing.

Q. Did you say, Mr. Akin, that you were familiar with this land itself in February of 1948?

A. Yes.

Q. What was the general appearance of the land, the subject property, and the surrounding property?

A. Well, this property lies just off the bank of the Salt River bottom——

Q. Just one moment, please, Mr. Akin. When you say Salt River, is there any water in that river?

A. No, the river is entirely dry and has become an unsightly desert because of the fact that all the water is stopped in the dams above. The area to the west and north is largely either abandoned farm

(Testimony of Wayne M. Akin.)

land or undeveloped desert. To the east, there is a series of shack-type, small tracts and farms and alkali desert. The land immediately south and east of the property which is now owned by Mr. Haggard is now well-farmed as much *in* the development has transpired since 1948.

Q. Do you know what the condition of the ditching was of this property, the Butler 160 acres, during the beginning of 1948?

A. Yes, it was open dirt ditch type of water supply, rather significant that particularly along the north side of [92] this property, the erosion from gopher activity was bad and, consequently, it was necessary to run a false ditch or secondary ditch inside the main ditch of the Peninsular and Horowitz Water Company ditch in order to protect the erosion on that north end, unsightly piece of waste land. Ditches, of course, are of a nature that are expensive to maintain.

Q. Now, with respect to the water that was delivered to this particular land in February of 1948, Mr. Akin, would you please describe, please tell the Court and myself how much water is delivered under the contract that you refer to or what the source of the water is, the total source that is delivered to the area.

A. Well, the water is entirely derived from pumps.

Q. What do you mean when you say "pumps"?

A. Which are basically drainage pumps. There are wells located—I can point them out, their loca-



(Testimony of Wayne M. Akin.)

tion. There are three wells that, from the standpoint of the district, served the Peninsula and Horowitz water area, the land of which is drawn on the blackboard, 2,262 acres,—

Q. These wells—

A. —to be accurate.

Q. —produce all of the water that is used to farm that land?

A. No, there are at least two private wells but those wells provide all of the water from which there is a firm water [93] right pertinent to that land.

Q. What is the condition of the water that is delivered to the land from the wells and from the Salt River Valley Water Users Association?

A. Well, those wells are very salty.

Q. Do you know what the water analysis of it is?

A. The average analysis in 1955 was 2,845 parts per million of total soluble salts.

Q. Did that condition prevail in 1948?

A. Yes, except that it was worse in '48.

Q. What is the effect of that amount of salt in the water on the farm land that is being farmed?

A. Well, it requires much larger than normal quantities of water because you have a continuous leaching problem.

Q. What do you mean by "leaching," Mr. Akin?

A. Well, for each 700 parts per million of total salts in an acre-foot of water, you'll put a ton of salt on the land, so that means that 2800 parts for

(Testimony of Wayne M. Akin.)

each acre-foot of water you'll put roughly four tons of salt. If you put five-acre feet of water on the land, you're going to, in the process of a year, add 20 tons of salt per acre. The extent to which that water is used and transpired by plants will leave that salt in the soil and it would accumulate in a short time to where the land would become useless except where you apply more water than the plants can use, carrying that excess salt [94] down into the drainage below the root zone.

Q. Is that what you call alkali land?

A. Yes.

Q. What was the cost approximately in 1948 of dropping a deep well for purposes of providing additional water to an area such as Mr. Butler's property?

A. Well, wells of the type which we are talking about, the well and pumping equipment together with the engine, would cost in the neighborhood of \$30,000.

Q. Was there any such well on Mr. Butler's property at the time you viewed it? A. No.

Q. Therefore, the only water that is available to that land is the water which is delivered by the Salt——

Mr. Clark: Objection, your Honor, this appears to be immaterial.

The Court: Well, he testified already that this Waters Users Association had three pumps which furnished the area. I don't see anything new about this.

(Testimony of Wayne M. Akin.)

Mr. Clark: It has been testified already. There were pumps.

The Court: I agree that it is a resumming up which is unnecessary but I don't see that it is worth arguing about.

Mr. McLane: Would you restate the question, please?

(The question was read by the Reporter.)

Q. (By Mr. McLane): River Valley Water Users Association?

A. That is a correct statement insofar as firm water is concerned. That is water that applies to an inherent right of the land to demand it. The only other water might be derived by purchasing from a private well.

Q. Without water from a private well, was the water available from the Salt River Valley Water Users Association sufficient to farm this land, Mr. Butler's 160 acres?

A. No, it was not sufficient to fully farm it.

Q. Could the farm be operated partially? That is, a portion of the area farmed.

A. Yes.

Q. Approximately what amount?

A. Well, strictly speaking, the firm water for the Peninsular and Horowitz area was only about 50 percent of the normal requirement.

Q. Would you please tell the Court what is meant in Arizona by the term "critical water area"?

A. Under the Arizona law, either the State Water Commissioner or the Water users and land

(Testimony of Wayne M. Akin.)

owners within an area can request that a critical area be set up after due hearings if the Commissioner, if the State Water Commissioner then declares the area critical, which means that the exhaustion or the use of the underground water is faster than the normal [96] replenishment and therefore that there is danger of exhausting the underground water supply, it is the duty of the State Water Commissioner to declare that water critical and stop all future drilling of wells for the purpose of irrigating new land.

Q. Is the area in which Mr. Butler's land or, rather, now Mr. Haggard's 160 acres which was purchased from Mr. Butler, now in a critical water area?      A. Yes.

Mr. Clark: Objection.

The Court: What is the objection?

Mr. Clark: I object to that, that is a little too remote, whether it is now a critical water has no bearing on what the situation was in——

Mr. McLane: I intend to ask questions, your Honor, to show——

The Court: I don't know what the relationship is. According to this witness' testimony, if the land is declared critical, then you couldn't pump water for new farm developments. He hasn't said anything about limiting it as to old farm developments, yet. I am going to assume it is preliminary. So far, the witness hasn't said anything which is significant in relation to the last question, but we will see what direction it takes.

(Testimony of Wayne M. Akin.)

By Mr. McLane: [97]

Q. Mr. Akin, at the time, as of February 9th, 1948, was the Butler area—strike the question.

What is the cost of applying water to the 160 acre Butler tract, Mr. Akin—what was the cost, rather, in February 1948?

A. You are talking about the cost of the water now or the cost of irrigation and labor?

Q. The cost of applying that water to the land?

A. Well, I, of course, have no means of knowing accurately what it was.

Q. How would you describe the location of the land in terms of good, bad, or indifferent?

A. Well, being within easy reach of Phoenix, I would consider that, in general, it was well-located from the standpoint of facilities, such as schools, churches and all of the things that make a community desirable, but undesirable as to the immediate vicinity.

Q. What type of roads served the area?

A. Well, in 1948, the roads were dirt roads, relatively poor in the immediate vicinity, good roads as you approached the city.

Q. What is the classification of the soil in that area?

A. The subject property is quite uniformly silt loam of the Gila series, a medium textured very good soil.

Q. Is it necessary in order to farm [98] Mr. Butler's particular 160 acres that the property be leached more than once or—



(Testimony of Wayne M. Akin.)

A. Oh, certainly. When you are applying the amount of salt, you are to that land continuously, you got a continuous and perpetual job of leaching to do.

Q. What is the situation with respect to the drainage of that particular 160 acres?

A. It is satisfactory.

Q. Do you consider when appraising land any factor with respect to what type of crops can be planted and grown there?

A. Oh, very definitely.

Q. And what was in February of 1948 the situation with respect to Mr. Butler's 160 acres of land insofar as the type of crops that could be produced on that land?

A. Well, it was unsuited to any type of crop that requires a low frost situation. In other words, cirrus or any crop of that kind is out because of the alkali situation and the alkali water. Vegetables and melons and that kind of thing are impossible of successful production. So that insofar as any ordinary farming is concerned, it is limited to feed crops, hay, grain. It is a livestock type of operation. Cotton can be grown successfully but it is second-rate cotton land.

Q. When you appraise the value of farm property, do you consider as a factor the status of the land with respect [99] to the extent to which it has been levelled?

A. Oh, yes. I think it is significant that practically all of the subtropical type of land that is

(Testimony of Wayne M. Akin.)

standard in Central Arizona has to very excellently levelled if it is going to have a high level of production.

Q. Did you consider the factor in your appraisal of this property as of February 1948, did you assume, rather, or consider that a certain amount of levelling had been done after February of 1948?

A. I was aware of the fact that, during the investigation, that over \$100 an acre had been spent since that time. However, having farmed in that community for several years and having been familiar with it for 20 years, I was very well aware of the fact that that was a rough, tough piece of land in 1948.

Q. What was the housing which existed on the property during February of 1948?

A. There were a couple of very poor labor shacks.

Q. Do you consider comparable sales in making appraisals of farm property, Mr. Akin?

A. Yes, sir.

Q. Did you do that in this instance?

A. I did.

Q. And what did you discover?

A. I discovered that the land that is [100] immediately south of the subject property on the chart there, the McCallum 400 acres, was transferred in 1944 for \$100 an acre; that the area which adjoins the subject property on the east and which adjoins the McCallum property on the southwest, approximately 728 acres, was moved in 1946 at an

(Testimony of Wayne M. Akin.)

average value of \$192 an acre; the 320 acres, the most easterly area there, marks the Miller Johns, in 1948 was transferred at \$140 an acre——

Mr. Clark: Your Honor, I move to strike that last testimony on the basis that he is testifying to hearsay. He hasn't shown that he knows of his own knowledge what these prices were.

The Court: Well, Mr. Clark, I think you are a little late on that, but you can bring that out on cross examination as to the weight, if any, of the testimony.

Q. (By Mr. McLane): Mr. Akin, how did you acquire the information with respect to the amount that was paid for each of these three adjoining pieces of property?

A. The information in regard to the McCallum land was furnished by Mr. Haggard and the——

Mr. Clark: Objection. He is testifying right now to hearsay evidence, something that was told him. I move to strike the testimony.

The Court: Isn't it substantially in the record that Mr. Haggard testified to those same things?

Mr. McLane: Yes, sir.

The Court: When he was on the witness stand.

Mr. Clark: That is true.

The Court: This witness took the same factors into account. We already have it substantially for whatever it is worth in the record. If you want, Mr. McLane, to say to this witness, assume that these particular properties were sold for so much, is that a factor that you have taken into account,

(Testimony of Wayne M. Akin.)

why, we could probably back around it that way. I just don't feel that it makes that much practical difference as the evidence is already in the record and since about 80 percent of that he has testified to came in before there was any objection.

Mr. McLane: Yes, sir.

The Witness: Excuse me. I am a little confused. I don't know where to proceed from here.

The Court: Start a new question, Mr. McLane.

Q. (By Mr. McLane): From whom did you obtain the information that the adjoining pieces of property were sold or purchased in the amounts that you have just testified to?

A. In the instance of the McCallum land, it was entirely from Haggard, and verified by checking the record insofar as we could determine by revenue stamps, and, in the instance of the Miller Johns property, it was checked with Mr. [102] Miller.

The Court: Well, as to the Miller Johns property, I will have to strike out his answer unless you can corroborate it through some other witness.

Q. (By Mr. McLane): Mr. Akin, assuming that Mr. Haggard paid \$192 per acre for the adjoining Miller Johns land in the year 1946 in the amount of 728 and six-tenths acre, was that factor considered by you in making your appraisal of the value of this property as of February 1948?

A. Yes, it was.

Q. Assuming that Mr. Haggard paid the price of \$140 an acre for the 320 acres during the year

(Testimony of Wayne M. Akin.)

1948 from Miller Johns, was that factor considered by you in making your appraisal of a fair market value of this property during 1948?

A. Yes, it was.

Q. Do you know what the taxes, the assessed value on this property was during 1948?

A. Yes, sir.

Q. What was it?             A. \$3,265.

Q. And what was the tax that was paid?

A. \$191.33.

Q. Do you know that of your own knowledge?

A. I took it personally off the records of [103] the Treasurer of the county.

Q. In making your appraisal, did you appraise as of February 1948 the entire 160 acres as so much acres or did you break that down, by acreage and buildings and so forth?             A. I broke it down.

Q. And how did you do that, Mr. Akin?

A. I calculated the total water supply, or calculated the area which, in my judgment, had a sufficient water supply to handle it in a reasonably normal manner which, taking all factors into consideration, I thought was around three-quarters of the property. There are about five acres of roads and waste, so I set up 115 acres of usable land with an adequate water supply at \$150 an acre, took 40 acres that can only be used by fitting into a rotation with other land, valued it at \$100 an acre, and then give no value to the waste and roads and \$500 to the buildings, making a total of \$21,750.



(Testimony of Wayne M. Akin.)

Q. Did you take any pictures of the Butler property recently? A. Yes, I did.

Q. When?

A. Well, it was in February 1955.

Q. From your own knowledge of the property during the year 1948, is it your opinion that the pictures you took represent the condition of the Butler 160 acres during that period of time? [104]

A. No. As a matter of fact, the condition of the property is materially better now than it was in '48.

Mr. McLane: Mr. Clark is going to object to these, your Honor, so may I have them marked for identification, please?

The Clerk: Petitioner's Exhibits 10 to 17 marked for identification.

(The documents above referred to were marked Petitioner's Exhibits Nos. 10 through 17 inclusive, for identification.)

Q. (By Mr. McLane): Mr. Akin, I hand you Petitioner's Exhibits marked for identification 10 through 17 and ask if you will examine and identify them, please?

A. By identifying them, you mean you want me to tell you what they are?

Q. Yes, please.

A. Well, Exhibit 10 is characteristic of the farmsteads, if you can call them that, in the area lying east of the property.

No. 11 is taken from approximately the north

(Testimony of Wayne M. Akin.)

center side of the subject property looking east across the north end.

No. 12 is taken from the northwest corner of the property looking slightly south of east. [105]

No. 13 is a picture of the land adjoining the subject property on the north, this No. 13 being a formerly farmed area that has now been abandoned.

No. 14 is a picture of the river bottom, undeveloped land lying north of the property.

No. 15 is a picture of the farm directly west of the subject property.

No. 16 is a picture of the country adjoining the subject property along its eastern line and across the road north.

And, No. 17 is a farm approximately a quarter of a mile east of the subject property which shows the vicinity.

Mr. McLane: Your Honor I offer these exhibits in evidence for the purpose of showing the condition of the land in 1948 on the basis of the witness' testimony, that it had improved since then, and offer them for the reason that these visual aids will certainly show a condition of land that was no better in 1948 than today.

Mr. Clark: Objection, your Honor. These pictures are taken in 1955. It appears that they are remote, although the witness has testified to the fact that the property is perhaps generally better than it was in 1948.

The Court: Mr. Clark, I am going to sustain

(Testimony of Wayne M. Akin.)

your objection if you present it. Just what harm do they do you?

Mr. Clark: Well, there is no way in the world to tell [106] where those pictures were taken. They can take one little bad spot and take a picture of it.

The Court: All right. Objection sustained.

Q. (By Mr. McLane): Mr. Akin, have you prepared a map of the area, a drawing?

A. Yes, sir.

Q. Would you please take that from your report?

A. You want this deleted from the report, you mean?

Q. Yes, please.

Mr. McLane: May I have marked as Petitioner's Exhibit next in order, the drawing of the subject property and surrounding property prepared by the witness?

The Court: Petitioner's Exhibit 18 marked for identification.

(The document above referred to was marked

Petitioner's Exhibit No. 18 for identification.)

Mr. McLane: Your Honor, Mr. Akin has identified this already. I think it is unnecessary to go through the procedure again. This is offered in evidence for the purpose of providing a visual aid in making a determination on this case.

Mr. Clark: No objection.

The Court: All right. It will be received.

The Clerk: Petitioner's Exhibit 18 will [107] be admitted in evidence.

(Testimony of Wayne M. Akin.)

(The document above referred to heretofore marked Petitioner's Exhibit No. 18 for identification was received in evidence.)

Q. (By Mr. McLane): Mr. Akin, does the State of Arizona sell land to farmers?

A. Yes, sir.

Q. Under what terms is that farm land sold?

A. In general—of course, it may be sold in any terms set by the State Land Commissioner provided they are no less than—I should correct that, approximately 7 percent down and, I believe it is, 33 years—very long time—to pay out, 5 percent. That is approximately correct.

Q. Does the price per acre under terms such as those exceed greatly or at all the price per acre at which that same land transfers hands as between private individuals?

A. Yes, I think it is axiomatic that the easier the terms, the higher price that can be demanded.

Mr. McLane: That is all, your Honor.

#### Cross Examination

Q. (By Mr. Clark): Mr. Akin, did you at any time view this particular piece of property at any time during 1948 to your knowledge? [108]

A. I was working in the vicinity constantly. I don't remember specifically going on this property during 1948. I don't know whether I did or not, I just can't remember that particular period.

Q. You testified that you believed that this

(Testimony of Wayne M. Akin.)

property to be quite poor so far as the productivity is concerned?

A. I would say it has definite limitations.

Q. Well, what net return would you say could reasonably be expected from this property in 1947 or 1948?

A. Under what circumstances? I don't—

Q. As a farmer, farm land.

Mr. McLane: Well, I object to the question on the ground that I believe you haven't stated, Mr. Clark, what particular type of crop you are referring to.

The Court: Well, this witness is here as a valuation expert, Mr. McLane.

Mr. McLane: Withdraw the objection, your Honor.

The Court: And he has testified as to value of the land, but he didn't take into consideration earning capacity in some form or other, and I think the question may properly be answered.

The Witness: I will answer it this way: Land produces an income due to three factors. One, the thing that is being farmed, the basic ability of the land to produce the crop that is planted on it, and the management of the property in the [109] process. The management is quite important as the land itself. Therefore, in making an appraisal, it is customary to calculate an income on the typical crops grown in the area by an operator of typical ability.

Now, that qualification, I would say that a net



(Testimony of Wayne M. Akin.)

return to land, but not to land and management, in other words, the return to capital should be on the order of \$3,000 to \$4,000 a year in 1947.

Q. What would you say would have been a reasonable rental then for this property in 1948?

Mr. McLane: Object to the question on the ground that the Tax Court has stated over and over again that rent need not be reasonable, if that is the purpose for which you are asking the question, Mr. Clark.

The Court: The objection is overruled. The issue here isn't solely whether the rent was reasonable or unreasonable. The issue is whether it was rented or not. Now, this witness has testified to an earning capacity. He has given prior testimony as to actual rental for the year before. I think it is material to the determination of this case as to what fair rental value of this property was in February of 1948 and I think the question directed to this witness to that effect which I understand the question to be would be proper.

The Witness: Will you restate the question, please? [110]

Q. (By Mr. Clark): What would you say would have been a fair or reasonable rental charge for this property, this 160 acres of property, in 1948?

The Court: Amend that to February of 1948, not that I am asking for only one month's rent, but when you are talking about determining fair rental

(Testimony of Wayne M. Akin.)

value, you determine it as of a particular date, naturally, looking to the future.

The Witness: I'd like to qualify what I am saying, Judge. I know what this rental was—I couldn't help knowing it in this investigation.

The Court: I know you know what it was, but you also know what you figure the earning capacity of it was. Now, we are talking about fair market or fair rental value, not what Mr. Haggard paid and not what some written document said he paid; eliminating Mr. Haggard from the scheme of things and turning you back to February of 1948 and asking you to determine as an expert, state an opinion as an expert, what the fair rental value was at that time.

The Witness: The fair rental must be qualified by whether you are taking the fair rental in its relationship to something else or whether you are taking it all by itself. The fact of the matter is that this was not taken by itself and as such——

The Court: That is not the question, now, but so far as that is concerned, you could say the same thing about your valuation of some \$21,000 for the property itself. You could [111] take all of your factors into consideration. You could say that if it was going to be neglected, it wasn't worth anything. If a well was going to be dug, it might be worth something else. If, by any chance, the water supply in the area was changed, it could still be something else, but you know perfectly well as a valuation man that there is such a thing as a fair

(Testimony of Wayne M. Akin.)

market value of property to which you have already testified and, on the same principles there is such a thing as a fair rental value.

If there are any exceptional circumstances which made this particular rental higher in the instance, it would still be higher than fair rental value. It might be legitimate rental value, but we are talking about fair rental value and I think you understand quite well and I feel that you should give us your opinion unaffected by what you happen to have determined from Mr. Haggard or anyone connected with it.

The Witness: As nearly as I can answer the question forthrightly, if this land, taken by itself, were being rented to a typical operator in February 1948, it would probably have rented for around \$5,000.

The Court: Why would the rent be \$5,000 if its productivity was \$4,000?

The Witness: For the simple reason that, at that time, there was a terrific scramble for land in rental. The pattern of occupancy from sale, pattern of sales was bad and farmers [112] were trying to get land under rental conditions.

The Court: Would you say the fair rental value had the faintest relationship to \$12,000 a year?

The Witness: Yes, I would. There was a lot of land leased at that time for around that figure.

The Court: All right.

The Witness: In fact, I personally rented some land at that figure at that time.

(Testimony of Wayne M. Akin.)

The Court: Well, you may have done it and it may have been comparable land; it may not have been. I must say there is a hiatus in my opinion between productivity of \$4,000 a year, rental value of \$5,000, and rental value of \$12,000 a year.

The Witness: I quite agree, but in trying to make a market value, these extraneous factors that I was mentioning all enter into the thing. They are just as inescapable as they can be.

The Court: All right. If your counsel wants you to, you can explain extraneous factors, if you know them of your own knowledge. We haven't stopped at this point. Counsel for Mr. Haggard can ask you anything he wants on redirect. In the meantime, Mr. Clark can ask anything he wants and I have the privilege of asserting myself once in a while, too. Go ahead.

Q. (By Mr. Clark): Then, as [113] I understand your testimony, it would not be unreasonable to rent for 12,000 property which you have valued at slightly over \$21,000?

A. No, it wouldn't be unreasonable in the light of lots of other circumstances that surround this thing.

Q. What is the customary ratio to rental in relation to fair market value property in this area?

A. In an economy such as there is in Central Arizona, there actually is relatively little direct correlation. There's so many factors that enter into the desirability or the demand for land that if you

(Testimony of Wayne M. Akin.)

take the historical rental on land, you will now be able to establish a very definite pattern.

That is the reason why, in appraising, we attempt to go back to a typical situation, the land by itself, rather than taking an historical situation because you get so many distortions in the historical picture that you can't come up with a valid analysis of the situation.

I can document those statements if it is desirable.

Q. Mr. Akin, say in the area as a general situation, would you say that 10 percent of the value of the property would be a fair rental or 1 percent monthly?

A. Do you mean a rental that might reasonably be expected? Is that what you mean?

Q. Exactly.

A. It would be quite unusual if—well, let me put it this way: There are many instances in which there is a very [114] wide diversity actually in rentals away from 10 percent. In general, land that is within the area of the Salt River Valley Water Users Association, 10 percent will follow a reasonable accurate pattern. When you get outside of the Salt River Project as such, you get into these unusual pumping and diversified water situations. You will find some very unusual rentals that bear no relationship to 10 percent. It may be anything from 2 or 3 percent to 50 percent. In an area that is precarious as to water, it is not at all unusual to have a special use of it, rental for



(Testimony of Wayne M. Akin.)

special use for a short period at a very high fraction of the sale value because your sale value carries over to a permanent capitalization and in times such as we were going through at the end of the war there were many instances when rentals were clear out of proportion to stable, long-time rentals, just as the same thing was true, for instance, in the stock market, screwy situations.

Q. Were you aware of the fact that there was a well dug in the immediate vicinity to Mr. Butler's property? When I mention Mr. Butler's property, I am referring to this 160 acres of property, so far back as 1946 or 1947, that gave Mr. Butler access to water for irrigation purposes.

A. Yes, sir.

Q. Did you take that into consideration in making up your—

A. I did, but I valued this as though that [115] were not pertinent to the property which is my understanding it is not. It is a right, it is available, but not appertinent to the property.

Q. But Mr. Butler owned a part of that pump in that well and when he sold the land that well and water right went with the property?

Mr. McLane: Is any of that in the record, Mr. Clark?

Mr. Clark: Yes, Mr. Butler testified.

Mr. McLane: I don't recall it.

The Witness: Excuse me. I don't understand what you are asking me.

Q. (By Mr. Clark): You stated that the well

(Testimony of Wayne M. Akin.)

was not appertinent to the property itself. In other words, the well wasn't on the 160 acres of land.

A. No, that isn't what I mean by pertinent. None of these wells are on this land.

Q. That is right.

A. But the water from the other wells is appertinent to the land. The land is a fee simple title, fee simple title to the land includes certain water. The Peninsular and Horowitz Water is a part of the fee simple title of that land, it is appertinent to the land, cannot be separated from it. This other we are talking about is not appertinent to the land, can be separated from it, and therefore is something separate [116] and hence it should be valued separately which I did, and the value of the water, if you are going to consider it then, the value of the interest in the well should be added to my appraisal; if you are going to take that, it is just as separate as though it were a truck or something else that could be separated from the land, you see.

Q. Now, if that land were on the Butler property, on the 160 acres, would your appraisal of the property have been different?

A. Yes, that is, if the well had been owned by Mr. Butler, is that your question? That well could have been on the Butler property and not belonged to Mr. Butler, just as the other wells are on other—well, the other wells are on property, I believe, that belongs to the Salt River Valley Water Users Association. In other words the location of the well

(Testimony of Wayne M. Akin.)

is not—does not fix absolutely the ownership to the right to that water in that well.

Now, if the well were on the land and under the law appertinent to it, then it would certainly have a very definite bearing on the value of the land, which in my judgment it does not have under existing circumstances.

Q. If that well was partly owned by the owner and he had rented some water rights to his neighbors, would that have affected the valuation of the land? A. Insofar as—— [117]

Q. This is a hypothetical situation, of course.

A. Yes. If he owns a fraction of the well?

Q. Yes.

A. Yes. That well will be added to the thing, just the same as you sold the land with a truck connected with it. Then you value the land and add the value of the truck, you see. You buy the two together. So that if Mr. Haggard was buying a fraction in the well, then whatever that fraction was should be added to my appraisal of the land. Do I make myself clear?

Q. Are you familiar with the water table?

A. Yes.

Q. In this area? A. Yes.

Q. Isn't it a fact that this water table lowers from year to year and has been for some time in the past? A. That is correct.

Q. Isn't it a fact that when there is alkali in the soil when your water table is high, that it maintains an alkali in the upper part of the soil? How-

(Testimony of Wayne M. Akin.)

ever, as the water table lowers, the alkali seems to soak in, goes deeper, and therefore makes the surface land more capable of production?

A. I would not accept the statement that you have made. If you want me to, I will undertake to explain to you what does actually transpire. [118]

Q. I think that will be very helpful.

A. Do you want me to go ahead?

Q. Yes.

A. If the water table is close to the surface, then the capillary action from that water table continually carries water toward the surface. It is evaporated off the surface. It is very difficult, if not impossible, to leach out the salts that are there by accumulated in the upper layers of the soil. When you drop your water table down far enough so that by adding water on top, you can keep diluting that salt and carrying it down through the root zone. You can then make that root zone productive.

Now, in order to maintain the productivity of that soil, you have got continually to be putting water in excess of that used by the plant, carrying it down below the root zone and hence out of the way of the plants, and that is exactly what I am saying about the necessity for using larger volume of water and leaching. That is what leaching is, diluting the salts, carrying them down out of the root zone.

Q. You mentioned on direct examination that there is some type of water emergency in that area.

(Testimony of Wayne M. Akin.)

I cannot recall your designation of that situation.

A. I didn't designate it. I think you are referring to the fact that counsel asked if this was a critical area.

Q. That is the word. [119]

A. If it had been declared a critical area by the State Water Commissioner, and I said that it had been.

Q. When was it declared?

A. My recollection is that it was either late in '53 or early in '54, something like two years ago.

Q. Mr. Akin, does the state valuation for property tax reflect the actual valuation of the land?

A. Proportionately, but not—I mean the assessed value is deliberately very much below the true market value of the land, but presumably—

Q. That is what I wanted to know.

A. The various properties are *equalied*, supposed to be all the same proportion, theoretically.

Mr. Clark: No further questions.

#### Redirect Examination

Q. (By Mr. McLane): Mr. Akin, what is the economic effect on a farm operator of a continuously lowering water table in his wells?

A. Well, the lower the water table, the higher the cost of lifting the water out so that the water costs more as the water table goes down.

Q. Does it reach a point where it is no longer feasible to farm when that water level has dropped to a certain level?           A. Yes.



(Testimony of Wayne M. Akin.)

Q. In this particular area of the Butler [120] property, you testified, or at least the question by Mr. Clark, it was stated that the water level was continuously dropping. Was that the case in 1948?

A. Yes.

Q. Is it for that reason that an area is declared a critical water area?            A. Yes.

Q. So that prior to the time in areas declared a critical water area, you have reasonable expectations that it will be on the basis of continuously dropping water level?

A. I didn't understand the question.

Q. Strike the question.

In an area where the water level is continuously dropping, can you reasonably expect, in the light of Arizona's water conditions, that that area will become a critical water area if the water is not replenished through some other source?

A. Yes. The term "critical" means that the water, that more water is being withdrawn from the underground supply than is being returned to it, and therefore it is being exhausted, just like a mine.

Q. That is why we are arguing with California, is that correct?            A. That is correct.

Q. Now, what is the proportion—Mr. Clark asked you a question about assessed value to real value or—— [121]

The Court: Gentlemen, I am not the slightest bit interested in assessed value.

(Testimony of Wayne M. Akin.)

Mr. McLane: I was going to ask what the proportion of it was.

The Court: There is a figure in the record compared to his evaluation and there was an assessment figure of a little over \$3,000 for the property which has no relationship to this case at all.

Q. (By Mr. McLane): Mr. Akin, you stated in answer to a question by Judge Fisher that some extraneous factors are considered in determining the fair rental on farm land in the area of Mr. Butler's property and the vicinity around Phoenix. Would you state what some of those extraneous factors are?

A. The capacity of land to produce is very largely influenced by its combination with other land. A large body of land taken together can be handled in a rotation manner that will make all of that land produce a higher production than any small fraction of it can produce by itself and that is particularly true in handling livestock. 160 acres cannot handle livestock effectively. When you got ten times that much land taken together, it all produces a situation in which you got an efficient and profitable enterprise, so that land taken with other land is extremely important in its value to a unit as a whole. [122]

Q. Are there any other factors, extraneous factors, that were existent in February of 1948?

A. Probably the most important single factor is the effect of the way the water is provided. For instance, you can—you have three pumps that

(Testimony of Wayne M. Akin.)

each produce about a little over 3,000 gallons per minute each, or, we will say for the purpose of this illustration, around 9,000 gallons a minute. Now, that water is divided up among all of the fields that are subject to that water right. If you can take that water as a body and use it progressively over a large area, you can get vastly more efficient use out of your water and therefore you can put more land per crop to use and therefore you can make all of that land produce more money per acre.

Then, you got the further factor that you have got this continuous leaching problem and if you are going to leach land, you can't in many instances, you can't leach it and farm it at the same time, so you have got to have certain fractions of your land that you are laying out all the time.

Then, you've got the problem of relevelling and of fitting in your crop rotation so that it becomes very significant as to whether a piece of land, how a piece of land fits into an over-all pattern of a larger enterprise, as to what that particular little piece may be worth to the general operator.

Q. When you refer to the term "critical [123] water area," does that mean that no more wells may be dropped in that area?

A. For the production of new land, for the subjugation of new land.

Q. In other words, you must continue to use whatever wells are in existence, no others?

A. You must continue to farm whatever land is being farmed and no more.

(Testimony of Wayne M. Akin.)

Q. And then, if the water level continues to drop, you are still restricted by the number of wells that are in the area? A. That's right.

Mr. McLane: No further questions.

The Court: Is that all?

Mr. Clark: Just a couple more questions, please.

### Recross Examination

Q. (By Mr. Clark): When were you hired by Mr. Haggard to make this appraisal?

A. About three months ago. I don't remember the exact date.

Q. About three months ago? A. Yes.

Q. It was during 1955?

A. I can't remember. It was either late in '54 or early in '55. I just don't remember. [124]

Q. And did you know Mr. Haggard before?

A. Not very well. I knew who he was when I saw him but was not particularly well-acquainted with him.

Q. But you didn't have any business dealings with him before this? A. No, sir.

Mr. Clark: I think that is all.

The Court: All right. Thank you very much, Mr. Akin.

Is this witness excused by both sides?

Mr. McLane: Yes, sir.

Mr. Clark: Yes, sir.

The Court: Very well.

(Witness excused.)

Mr. McLane: The Petitioner rests, your Honor.

Mr. Clark: Respondent rests, your Honor.

Your Honor, may we request permission to withdraw the Respondent's Exhibits and substitute photostats in lieu thereof?

The Court: Yes.

Mr. McLane: And one exhibit introduced by Petitioners.

The Court: I will grant the right generally to substitute appropriate copies for any original papers.

Mr. Clark: Thank you, sir.

Mr. McLane: Your Honor, could we just—I just finished trying a case in Phoenix, I'd like as much time as possible on the briefs, if it is agreeable with the Court. I know this [125] is a familiar plea.

The Court: All right. How much time do you need?

Mr. McLane: I'd like 45 days, your Honor, and then maybe 30 days after Government's brief, before I need file reply brief.

The Court: Well, you want to file simultaneous or seriatim briefs or what?

Mr. Clark: I think simultaneous briefs will be all right.

Mr. McLane: I would prefer to file a brief first and then have the Government file one and then file a reply brief.

The Court: I don't require anybody—if the Government wants simultaneous briefs, if both sides agree, then I am willing to take seriatim briefs,



but I gather Respondent wants simultaneous briefs.

Mr. Clark: Yes, sir.

The Court: Very well. 45 days for the original brief and 30 days for the reply briefs.

Mr. McLane: Thank you, your Honor.

Mr. Clark: Thank you.

The Court: Anything further? All right, I suppose that means we will be recessing until Monday morning at 10 o'clock unless something develops in the meantime.

(Whereupon, at 3:30 o'clock p.m., the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed April 18, 1955.

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[Endorsed]: No. 15040. United States Court of Appeals for the Ninth Circuit. D. M. Haggard and Nila Haggard, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: February 20, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15040

D. M. HAGGARD and NILA HAGGARD,  
Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

PETITIONERS' STATEMENT OF POINTS  
AND DESIGNATION OF RECORD

Come now petitioners, D. M. Haggard and Nila Haggard, and cite the following points upon which they intend to rely for reversal of the judgment of the Tax Court:

1. The Tax Court erred in determining that the sole issue was whether the \$12,000.00 payment was in fact a payment of rent.

2. The Tax Court erred in holding that where a "lessee" acquires "something of value" in relation to the overall transaction, the "rental" payment does not come within the definition of rent in Section 23 (a)(1)(A) of the Internal Revenue Code of 1939.

3. The Tax Court erred in relying on Breece Veneer & Panel Co., 22 T.C. 1386 (1954), (on appeal C. A. 7th).

4. The Tax Court erred in holding that when rental payments materially exceed the current "fair-rental value" of the property "leased" and where the total payments made prior to the exercise of the option are disproportionate to the relatively small final amount required to acquire title, the "lessee" is building up a substantial equity interest in the property, as intended by the parties, and the payments in reality are being applied on the agreed purchase price of the property.

5. The Tax Court erred in determining that the intention of Mr. Butler and petitioners was to effectuate a sale on February 9, 1948.

6. The Tax Court erred in determining that the value of the 160 acres on February 9, 1948 was not \$21,750.00.

7. The Tax Court erred in determining that the fair rental value of the 160 acres did not exceed \$5,000 for 1948 or 1949.

8. The Tax Court erred in holding that petitioners did not carry their burden of proof with respect to the fair market value of the 160 acres on February 9, 1948.

9. The Tax Court erred in treating as evidence the legal presumption of correctness attaching to the Commissioner's determination.

10. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

The petitioners designate the entire record as certified by the Tax Court to the Court of Appeals for the Ninth Circuit as necessary for a consideration of the points upon which they intend to rely.

Dated this 17th day of February, 1956.

McLANE & McLANE,  
/s/ By NOLA McLANE,  
Attorneys for Petitioners

[Endorsed]: Filed February 20, 1956. Paul P. O'Brien, Clerk.